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Rubie McMurrian et al vs. Creslenn Oil Company et al, a 10-Year Ethical Dilemma

Brian H. Ratcliff

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*Rubie Mcmurrian et al vs.
Creslenn Oil Company et al, a
10-YEAR ETHICAL
DILEMNA*

Brian H. Ratcliff

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Public Release

RADIOACTIVE CONTAMINATION OF AREA PROPERLY AT EXISTING RISKS

Land in the following counties in southern Arkansas has been contaminated with harmful, radioactive, and other hazardous substances due to certain oil and gas production activities which have been going on in these areas for the past several years:

- UNION COUNTY
- OUACHITA COUNTY
- COLUMBIA COUNTY

If you own land in any of the above areas, and any company or individual has operated oil, gas, and/or salt water disposal wells, or used oil production equipment and disposal pits upon your land, you must find out if your land has been contaminated. A meeting will be held on WEDNESDAY, JUNE 17, 1998, beginning at 6:30 p.m. at the King's Inn, Knight Room, 1920 Junction City Road (intersection of Highways 167 and 82-Business), El Dorado, Arkansas, to discuss whether your land has been affected and explore the possibility of a class action or individual lawsuit against the company or individual responsible.

Attorney Ted Boswell of the law firm of Boswell, Tucker & Brewster, P.O. Box 798, Bryant, Arkansas 72089, and Attorney Stuart Smith of the law firm of Sacks & Smith, 1615 Poydras, Suite 860, New Orleans, Louisiana 70112, will conduct the meeting and respond to any questions.

If you are unable to attend the public meeting, you may call Ted Boswell to obtain information at 1-(800)-847-3156 between 8 a.m. and 5 p.m. Monday through Friday.

The El Dorado Chamber of Commerce

reminds you

Please Don't Litter



West's Arkansas Code Annotated

Arkansas Rules of Professional Conduct (Refs & Annos)

Advocate (Rules 3.1 to 3.9)

Rules of Prof.Conduct, Rule 3.4

RULE 3.4. FAIRNESS TO OPPOSING PARTY AND COUNSEL

Currentness

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
- (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
- (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - (1) the person is a relative or an employee or other agent of a client; and
 - (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Editors' Notes

COMMENT

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

CODE COMPARISON (MODEL RULES)

With regard to Rule 3.4(a), DR 7-109(A) provides that "a lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal." DR 7-109(B) provides that "a lawyer shall not advise or cause a person to secrete himself ... for the purpose of making him unavailable as a witness...." DR 7-106(C)(7) provides that a lawyer shall not "intentionally or habitually violate any established rule of procedure or of evidence."

With regard to Rule 3.4(b), DR 7-102(B)(6) provides that a lawyer shall not "participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false." DR 7-109 provides that "a lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent on the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee or acquiesce in the payment of: (1) expenses reasonably incurred by a witness in attending or testifying; (2) reasonable compensation to a witness for his loss of time in attending or testifying; (or) (3) a reasonable fee for the professional services of an expert witness." EC 7-28 states that "witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise."

Rule 3.4(c) is substantially similar to DR 7-106(A), which provides that "A lawyer shall not disregard ... a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling."

Rule 3.4(d) has no counterpart in the Code.

Rule 3.4(e) substantially incorporates DR 7-106(C)(1), (2), (3) and (4). DR 7-106(C)(2) proscribes asking a question

RULE 3.4. FAIRNESS TO OPPOSING PARTY AND COUNSEL, AR R RPC Rule 3.4

“intended to degrade a witness or other person,” a matter dealt with in Rule 4.4. DR 7-106(C)(5), providing that a lawyer shall not “fail to comply with known local customs of courtesy or practice,” is too vague to be a rule of conduct enforceable as law.

With regard to Rule 3.4(f), DR 7-104(A)(2) provides that a lawyer shall not “give advice to a person who is not represented ... other than advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.”

Notes of Decisions (14)

Rules of Prof. Conduct, Rule 3.4, AR R RPC Rule 3.4
Current with amendments received through November 1, 2014

End of Document

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182 W.Va. 597
Supreme Court of Appeals of
West Virginia.

BOARD OF EDUCATION OF McDOWELL
COUNTY

v.

ZANDO, MARTIN & MILSTEAD, INC.

No. 18773. | Feb. 22, 1990.

School board filed action for damages against architect alleging failure adequately to design and supervise the construction of building. Architect filed third-party complaint against contractors, and school board filed alternate complaint against contractors. The Circuit Court, Kanawha County, John Hey, J., dismissed contribution claim of architect but refused to grant verdict credit for settlements between board and contractors. Architect appealed. The Supreme Court of Appeals, Miller, J., held that: (1) architect was not entitled to contribution from settling contractors, and (2) architect was entitled to verdict credit for settlements made by board and contractors.

Affirmed in part, reversed in part, and remanded.

West Headnotes (23)

- [1] **Contribution**
🔑 Nature and grounds of obligation
Contribution
🔑 Payment or discharge of common liability

Right to contribution arises if persons having common obligation are sued on that obligation and one party is forced to pay more than his pro tanto share of obligation. Code, 55–7–13.

3 Cases that cite this headnote

- [2] **Contribution**
🔑 Time for bringing action

Defendant in negligence action has right to join joint tort-feasor on cause of action for contribution before judgment; this is “inchoate right to contribution,” as distinguished from statutory right of contribution after joint judgment. Code, 55–7–13.

7 Cases that cite this headnote

- [3] **Negligence**
🔑 Joint and several liability

Plaintiff may elect to sue any or all of those responsible for his injuries and collect his damages from whoever is able to pay, whatever the percentage of fault; modified rule for contributory negligence did not remove joint and several liability. Code, 55–7–13.

2 Cases that cite this headnote

- [4] **Contribution**
🔑 Joint Wrongdoers
Contribution
🔑 Measure of contribution

Action seeking right of contribution before judgment may be brought by joint tort-feasor on any theory of liability that could have been asserted by injured plaintiff, even though amount of recovery in third party action based on contribution is controlled by amount recovered by plaintiff in main action. Code, 55–7–13.

14 Cases that cite this headnote

- [5] **Contribution**
🔑 Defenses

Joint tort-feasor shall be given credit for amount of any payments made by another joint

tort-feasor in satisfaction of wrong, if payment is made and release obtained. Code, 55–7–13.

6 Cases that cite this headnote

[6] **Contribution**

🔑 Defenses

Party in civil action who has made good faith settlement with plaintiff before judicial determination of liability is relieved from any liability for contribution. Code, 55–7–13.

14 Cases that cite this headnote

[7] **Damages**

🔑 Reparation by wrongdoer

Defendants in civil action against whom verdict is rendered are entitled to have verdict reduced by amount of any good-faith settlements previously made with plaintiff by other jointly liable parties.

19 Cases that cite this headnote

[8] **Damages**

🔑 Nature and theory of compensation

School board which suffered single, indivisible loss attributable to combined actions of multiple defendants in designing and constructing school building was entitled to only one compensatory damages award.

3 Cases that cite this headnote

[9] **Contribution**

🔑 Common Interest or Liability

Damages

🔑 Reparation by wrongdoer

If there is single indivisible loss arising from actions of multiple parties who contributed to loss, fact that different theories of liability have been asserted does not foreclose parties' right of contribution inter se or prevent parties from obtaining verdict credit for settlements made with plaintiff by one or more of those jointly responsible. Code, 55–7–13.

20 Cases that cite this headnote

[10] **Interest**

🔑 Contract and sales matters

Interest

🔑 Torts; wrongful death

School board which entered into construction contract was entitled to prejudgment interest on damage award for losses whether action was based on breach of contract or on tort. Code, 56–6–27.

2 Cases that cite this headnote

[11] **Appeal and Error**

🔑 Conduct of trial or hearing in general

Trial

🔑 Discretion of court

Whether motion for mistrial should be sustained or overruled is matter which rests within trial court's discretion, and action of trial court in ruling on such motion will not be cause for reversal on appeal unless it clearly appears that such discretion has been abused.

13 Cases that cite this headnote

[12] **Trial**

🔑 Comments on Evidence or Witnesses

Comments by counsel that he believed in his

client's case, that witness for opposing party had been unfriendly, and that one opposing witness had been "winking at the ladies on the jury" while counsel's back was turned, while improper, did not mandate mistrial.

23 Cases that cite this headnote

2 Cases that cite this headnote

[13]

Appeal and Error

🔑 Rulings on admissibility of evidence in general

Rulings on admissibility of evidence are largely within trial court's sound discretion and should not be disturbed unless there has been abuse of discretion.

[16]

Evidence

🔑 Knowledge, experience, and skill in general

Witness who had not been educated as structural engineer, but had many years experience in construction business and was familiar with methods used in disputed construction, could be allowed to testify as expert on structural matters. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

3 Cases that cite this headnote

5 Cases that cite this headnote

[17]

Witnesses

🔑 Persons Who May Be Required to Appear and Testify

In litigation involving multiple defendants, court would not require settling defendant's expert witnesses to testify for remaining defendant after other defendant settled before trial, absent formal agreement as to shared use of witnesses.

4 Cases that cite this headnote

[14]

Evidence

🔑 Matters involving scientific or other special knowledge in general

If scientific, technical, or other specialized knowledge will assist trier of fact to understand evidence or determine fact in issue, witness qualified as expert by knowledge, skill, experience, training, or education may testify in form of opinion or otherwise. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

1 Cases that cite this headnote

[18]

Witnesses

🔑 Nature and grounds of exclusion in general

In order to bar witness' testimony under Dead Man's Act, testimony must relate to personal transaction with person now deceased or insane, witness must be party to suit or interested in event or outcome, and testimony must be against representatives, heirs at law, or beneficiaries of deceased or insane person. Code, 57-3-1.

Cases that cite this headnote

[15]

Appeal and Error

🔑 Competency of witness

Evidence

🔑 Determination of question of competency

Whether witness is qualified to state opinion is matter which rests within discretion of trial court and its ruling on that point will not be disturbed unless it clearly appears that discretion has been abused.

[19]

Witnesses

🔑 Principal of agent deceased or incompetent

Allowing testimony from construction company witnesses as to conversations had with superintendent at time construction was planned was not error, even though superintendent had died prior to trial, where suit was not against superintendent's representative, but rather against principal for whom superintendent had acted as agent.

Cases that cite this headnote

[20]

Evidence

🔑 Statements by agents since deceased

Testimony of construction company's witnesses concerning conversations with school superintendent who had died before trial was admissible as statement made by agent or employee within scope of agency or employment during existence of relationship. Rules of Evid., Rule 801(d)(2)(D).

1 Cases that cite this headnote

[21]

Evidence

🔑 Agents or Employees

Statements made by agent or employee within scope of his agency or employment and during existence of agency or employment relationship are not hearsay and are admissible against principal or employer who is party to litigation. Rules of Evid., Rule 801(d)(2)(D).

3 Cases that cite this headnote

[22]

Appeal and Error

🔑 Examination and rulings as to competency of witnesses

Exclusion of statement of school superintendent who had died prior to trial was not reversible

error where construction company failed to show relevance of evidence or how exclusion was prejudicial to its case. Rules of Evid., Rule 801(d)(2)(D).

Cases that cite this headnote

[23]

Appeal and Error

🔑 Prejudicial Effect

If evidence is excluded and action of court in excluding it is relied upon in appellate court, it must appear on record that rejected evidence was or would have been relevant, material and important in order for its rejection to be available as ground of error.

2 Cases that cite this headnote

****799 *600 Syllabus by the Court**

1. "The doctrine of contribution has its roots in equitable principles. The right to contribution arises when persons having a common obligation, either in contract or tort, are sued on that obligation and one party is forced to pay more than his *pro tanto* share of the obligation." Syllabus Point 4, in part, *Sydenstricker v. Unipunch Prods., Inc.*, 169 W.Va. 440, 288 S.E.2d 511 (1982).

2. A defendant in a civil action has a right in advance of judgment to join a joint tortfeasor based on a cause of action for contribution. This is termed an "inchoate right to contribution" in order to distinguish it from the statutory right of contribution after a joint judgment conferred by W.Va.Code, 55-7-13 (1923).

3. "This jurisdiction is committed to the concept of joint and several liability among joint tortfeasors. A plaintiff may elect to sue any or all of those responsible for his injuries and collect his damages from whomever is able to pay, irrespective of their percentage of fault. Our adoption of a modified rule for contributory negligence in *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E.2d 879 (1979), did not change our adherence to joint and several liability." Syllabus Point 2, *Sitizes v. Anchor Motor*

Freight, Inc., 169 W.Va. 698, 289 S.E.2d 679 (1982).

4. Our right of contribution before judgment is derivative in the sense that it may be brought by a joint tortfeasor on any theory of liability that could have been asserted by the injured plaintiff. However, it is clear that the amount of recovery in a third-party action based on contribution is controlled by the amount recovered by the plaintiff in the main action.

5. “ ‘Where a payment is made, and release obtained, by one joint tort-feasor, the other joint tort-feasors shall be given credit for the amount of such payment in the satisfaction of the wrong.’ Point 2, Syllabus, *Hardin v. The New York Central Railroad Company*, 145 W.Va. 676 [116 S.E.2d 697 (1960)].” Syllabus Point 1, *Tennant v. Craig*, 156 W.Va. 632, 195 S.E.2d 727 (1973).

6. A party in a civil action who has made a good faith settlement with the plaintiff prior to a judicial determination of liability is relieved from any liability for contribution.

7. Defendants in a civil action against whom a verdict is rendered are entitled to have the verdict reduced by the amount of any good faith settlements previously made with the plaintiff by other jointly liable parties. Those defendants against whom the verdict is rendered are jointly and severally liable to the plaintiff for payment of the remainder of the verdict. Where the relative fault of the nonsettling defendants has been determined, they may seek contribution among themselves after judgment if forced to pay more than their allocated share of the verdict.

8. Where there is a single indivisible loss arising from the actions of multiple parties who have contributed to the loss, the fact that different theories of liability have been asserted against them does not foreclose their right of contribution *inter se* or prevent them from obtaining a verdict credit for settlements made with the plaintiff by one or more of those jointly responsible.

9. “Whether a motion for a mistrial should be sustained or overruled is a matter which rests within the trial court’s discretion and the action of the trial court in ruling on such a motion will not be cause for reversal on appeal unless it clearly appears that such discretion has been abused.” Syllabus Point 4, *Moore, Kelly & Reddish, Inc. v. Shannondale, Inc.*, 152 W.Va. 549, 165 S.E.2d 113 (1968).

10. “ ‘Rulings on the admissibility of evidence are largely within a trial court’s sound discretion and should

not be disturbed unless there has been an abuse of discretion.” *State v. Louk*, W.Va., 301 S.E.2d 596, 599 (1983).’ Syllabus Point 2, *State v. Peyatt*, 173 W.Va. 317, 315 S.E.2d 574 (1983).” Syllabus Point 7, *State v. Miller*, 175 W.Va. 616, 336 S.E.2d 910 (1985).

11. “ ‘If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to **800 *601 determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.’ W.Va.R.Evid. 702.” Syllabus Point 3, *Ventura v. Winegardner*, 178 W.Va. 82, 357 S.E.2d 764 (1987).

12. “ ‘Whether a witness is qualified to state an opinion is a matter which rests within the discretion of the trial court and its ruling on that point will not ordinarily be disturbed unless it clearly appears that its discretion has been abused.’ Point 5, syllabus, *Overton v. Fields*, 145 W.Va. 797 [117 S.E.2d 598 (1960)].” Syllabus Point 4, *Hall v. Nello Teer Co.*, 157 W.Va. 582, 203 S.E.2d 145 (1974).

13. “To summarize the basic operation of the Dead Man’s Act, W.Va.Code, 57–3–1, a concurrence of three general conditions must be met in order to bar the witness’s testimony. First, the testimony must relate to a personal transaction with a deceased or insane person. Second, the witness must be a party to the suit or interested in its event or outcome. Third, the testimony must be against the deceased’s personal representative, heir at law, or beneficiaries or the assignee or committee of an insane person.” Syllabus Point 10, *Moore v. Goode*, 180 W.Va. 78, 375 S.E.2d 549 (1988).

14. Statements made by an agent or employee within the scope of his agency or employment and during the existence of the agency or employment relationship are not hearsay and are admissible against a principal or employer who is a party to litigation. W.Va.R.Evid. 801(d)(2)(D).

15. “When evidence is excluded and the action of the court in excluding it is relied upon in the appellate court, it must appear on the record that the evidence rejected was or would have been relevant, material and important to make its rejection available as a ground of error.” Syllabus Point 5, *Maxwell v. Kent*, 49 W.Va. 542, 39 S.E. 174 (1901).

Attorneys and Law Firms

Daniel R. Schuda, Steptoe & Johnson, Charleston, for Zando, Martin & Milstead, Inc.

Stephen R. Crislip, William J. Powell, Jackson & Kelly,
Charleston, for the Bd. of Educ. of McDowell County.

Opinion

MILLER, Justice:

In this appeal, we address the validity of the dismissal of a civil defendant's claim for contribution against a joint wrongdoer who has settled with the plaintiff. We also address the right of the nonsettling defendant to have the verdict reduced to reflect such settlements. We conclude that the Circuit Court of Kanawha County properly dismissed the contribution claims of the defendant below, Zando, Martin & Milstead, Inc. (ZMM), but erred in refusing to grant a verdict credit for settlements between the plaintiff below, the Board of Education of McDowell County (Board), and other defendants.

In January, 1975, the Board entered into a contract with ZMM, an architectural and engineering firm located in Charleston, Kanawha County, to design and supervise the construction of Mount View High School near Welch, McDowell County. At the recommendation of ZMM, the Board subsequently hired, by separate contracts, the H.C. Nutting Company (Nutting) to do soil testing at the proposed school site and the Corte Company, Inc. (Corte), a general contractor, to perform most of the construction.

Cracks were found in the building almost as soon as the school opened in September 1978, and more appeared as time went on. In January 1982, a steel beam supporting a classroom fell. In July 1983, the south wall of the gymnasium suffered a structural failure during a windstorm.

"

5% McDowell County Board of Education

15% Zando, Martin & Milstead, Inc.

75% Corte Company, Inc.

0% H.C. Nutting Company

5% Others"

On February 22, 1984, the Board filed an action for damages in the Circuit Court of Kanawha County, alleging that ZMM had been negligent and had breached its contracts with the Board by failing properly to design and supervise the construction of the building. ZMM denied the allegations and subsequently filed a third-party complaint alleging that any damages suffered by the Board were due to the negligence of Nutting and Corte. The Board was then **801 *602 granted leave to file an alternative complaint against Nutting and Corte, charging each with breach of contract and with negligence.

In April 1987, the Board settled with Corte for \$600,000. Corte obtained a release from liability and was dismissed from the litigation. The trial court also dismissed with prejudice ZMM's cross-claims¹ against Corte on the ground that the settlement and release barred any further proceedings against Corte arising from the same transaction. The Board proceeded to trial against Nutting and ZMM several weeks later. In the course of trial, however, the Board settled with Nutting for \$30,000, and Nutting was dismissed from the action. The trial judge also dismissed ZMM's cross-claims against Nutting.

The case was submitted to the jury, and, on May 21, 1987, a verdict was returned awarding the Board \$1,000,000 in compensatory damages. Interrogatories subsequently submitted to the jury indicated that the verdict was predicated on findings of both negligence and breach of contract. The jury allocated the negligence involved as follows:

No punitive damages were awarded.

Following the verdict, ZMM sought to have the Nutting and Corte settlements deducted from the verdict. The Board, however, elected to have judgment rendered on the contract claim. The trial court refused to grant ZMM a credit for the Nutting and Corte settlements and, by order dated October 15, 1988, entered judgment against ZMM for the full \$1,000,000.

I.

A. The Right of Contribution

^[1] ZMM first argues that the trial court's dismissal of its cross-claims against Corte and Nutting impermissibly cut off its right to contribution. The right of contribution arises from liability for a joint wrong committed by two or more parties against the plaintiff. We explained the doctrine of contribution in Syllabus Point 4, in part, of *Sydenstricker v. Unipunch Prods., Inc.*, 169 W.Va. 440, 288 S.E.2d 511 (1982), as follows:

"The doctrine of contribution has its roots in equitable principles. The right to contribution arises when persons having a common obligation, either in contract or tort, are sued on that obligation and one party is forced to pay more than his *pro tanto* share of the obligation."

See *Estate of Bayliss v. Lee*, 173 W.Va. 299, 315 S.E.2d 406 (1984).

^[2] In *Haynes v. City of Nitro*, 161 W.Va. 230, 240 S.E.2d 544 (1977), we traced our prior cases in this area and concluded that a defendant in a negligence action has a right in advance of judgment to join a joint tortfeasor based on a cause of action for contribution. We termed this an "inchoate right to contribution" in order to distinguish it from the statutory right of contribution after a joint judgment conferred by W.Va.Code, 55-7-13 (1923).² 161 W.Va. at 234, 240 S.E.2d at 547.

^[3] In *Sydenstricker*, 169 W.Va. at 452, 288 S.E.2d at 518, we reaffirmed that this inchoate right of contribution "is

designed to moderate the inequity which existed in our law that enabled the plaintiff to cast **802 *603 the entire responsibility for an accident on one of several joint tortfeasors by deciding to sue only him.' " Quoting *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 354, 256 S.E.2d 879, 886 (1979). This right of the plaintiff to sue one or more joint tortfeasors is a companion principle of the doctrine of joint and several liability, which permits a plaintiff to recover the entire judgment from any joint judgment debtor. As we explained in Syllabus Point 2 of *Sitzes v. Anchor Motor Freight, Inc.*, 169 W.Va. 698, 289 S.E.2d 679 (1982):

"This jurisdiction is committed to the concept of joint and several liability among joint tortfeasors. A plaintiff may elect to sue any or all of those responsible for his injuries and collect his damages from whomever is able to pay, irrespective of their percentage of fault. Our adoption of a modified rule for contributory negligence in *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E.2d 879 (1979), did not change our adherence to joint and several liability."

^[4] In *Sydenstricker*, 169 W.Va. at 452, 288 S.E.2d at 518, we explained the scope of our inchoate right of contribution as follows:

"Our right of contribution before judgment is derivative in the sense that it may be brought by a joint tortfeasor on any theory of liability that could have been asserted by the injured plaintiff. However, it is clear that the amount of recovery in a third-party action based on contribution is controlled by the amount recovered by the plaintiff in the main action."

Thus, the right of inchoate contribution is not confined only to cases of joint negligence. Instead, it arises under any theory of liability which results in a common obligation to the plaintiff. Where, as here, the plaintiff seeks damages for a breach of contractual obligations, the named defendant is entitled to assert claims for contribution against other parties liable to the plaintiff for

the same injury even though the defendant was not a party to the contract between the plaintiff and the other parties.³ See 18 Am.Jur.2d *Contribution* § 10 (1985). The touchstone of the right of inchoate contribution is this inquiry: Did the party against whom contribution is sought breach a duty to the plaintiff which caused or contributed to the plaintiff's damages?

The fundamental purpose of inchoate contribution is to enable all parties who have contributed to the plaintiff's injuries to be brought into one suit. Not only is judicial economy served, but such a procedure also furthers one of the primary goals of any system of justice—to avoid piecemeal litigation which cultivates a multiplicity of suits and often results in disparate and unjust verdicts. See *Bowman v. Barnes*, 168 W.Va. 111, 282 S.E.2d 613 (1981). Moreover, as we have already indicated, joinder of contribution claims serves to ensure that those who have contributed to the plaintiff's damages share in that responsibility. We have also provided a method of apportioning the damages among the defendants according to fault in negligence cases.⁴ Finally, while the right of contribution is designed to promote equality among defendants, it is not automatic ****803 *604** and must be properly invoked to be preserved. See *Sizes v. Anchor Motor Freight, Inc.*, 169 W.Va. at 713, 289 S.E.2d at 688.

B. Termination of Contribution Rights by Settlement

^[5] Having spoken generally of the right to contribution, we must now discuss the law surrounding the termination of such a right when a joint wrongdoer settles with the plaintiff. Although we have never discussed this issue at length, we have developed, independently of any assertion of contribution, a practice of allowing the defendant against whom a verdict is rendered to reduce the damages to reflect any partial settlement the plaintiff has obtained from a joint tortfeasor. As we stated in Syllabus Points 1 and 2 of *Tennant v. Craig*, 156 W.Va. 632, 195 S.E.2d 727 (1973):

"1. 'Where a payment is made, and release obtained, by one joint tort-feasor, the other joint tort-feasors shall be given credit for the amount of such payment in the satisfaction of the wrong.' Point 2, Syllabus, *Hardin v. The New York Central Railroad Company*, 145 W.Va. 676 [116 S.E.2d 697 (1960)].

"2. Partial satisfaction of the injured person by one joint tortfeasor is a satisfaction, *pro tanto*, as to all.' Point 5, Syllabus, *New River & Pocahontas*

Consolidated Coal Company v. Eary, 115 W.Va. 46 [174 S.E. 573 (1934)]."

This practice is premised on the principle that a plaintiff is entitled to one, but only one, complete satisfaction for his injury. *Thornton v. Charleston Area Medical Center*, 158 W.Va. 504, 213 S.E.2d 102 (1975); *Cox v. Turner*, 157 W.Va. 802, 207 S.E.2d 152 (1974); *Tennant v. Craig*, *supra*; *New River & Pocahontas Consol. Coal Co. v. Eary*, *supra*; *Bloss v. Plymale*, 3 W.Va. 393 (1869).

These cases implicitly stand for the proposition that one who settles with the plaintiff prior to verdict is discharged from any liability for contribution.⁵ This is the approach taken by both the Uniform Contribution Among Tortfeasors Act, 1955, (UCATA)⁶ and the Uniform Comparative Fault Act (UCFA).⁷

Such a rule furthers the strong public policy favoring out-of-court resolution of disputes, which we stated in Syllabus Point 1, in part, of *Sanders v. Roselawn Memorial Gardens*, 152 W.Va. 91, 159 S.E.2d 784 (1968): "The law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation[.]" See *State ex rel. Vapor Corp. v. Narick*, 173 W.Va. 770, 320 S.E.2d 345 (1984); *Floyd v. Watson*, 163 W.Va. 65, 254 S.E.2d 687 (1979); *Janney v. Virginian Ry. Co.*, 119 W.Va. 249, 193 S.E. 187 (1937). As the California Court of Appeals stated in *Stambaugh v. Superior Court*, 62 Cal.App.3d 231, 236, 132 Cal.Rptr. 843, 846 (1976):

****804 *605** "Few things would be better calculated to frustrate this policy, and to discourage settlement of disputed tort claims, than knowledge that such a settlement lacked finality and would but lead to further litigation with one's joint tortfeasors, and perhaps further liability."

"No defendant wants to settle when he remains open to contribution in an uncertain amount, to be determined on the basis of a judgment against another in a suit to which he will not be a party." Unif. Contribution Among Tortfeasors Act, 1955, § 4(b), comment, 12 U.L.A. at 99. See *Rakowski v. Lucente*, 104 Ill.2d 317, 84 Ill.Dec. 654, 472 N.E.2d 791 (1984).

From a practical standpoint, the reduction of the verdict to reflect partial settlements counterbalances the loss of the right of contribution, since the remaining defendants, who would otherwise have been entitled to such right, obtain

the benefit of the settlement. See *Dunn v. Sears, Roebuck & Co.*, 645 F.2d 511 (5th Cir.1981); *Poupore v. Suguin*, 82 Misc.2d 1, 367 N.Y.S.2d 950 (1975). Verdict reduction also allocates liability to some extent among those jointly responsible for the plaintiff's injury. The settling defendant is, in effect, paying a share of liability on the verdict. At the same time, the use of the verdict credit ensures against double recovery by the plaintiff. See *Luth v. Rogers & Babler Constr. Co.*, 507 P.2d 761 (Alaska 1973); *Lafayette v. Los Angeles County*, 162 Cal.App.3d 547, 208 Cal.Rptr. 668 (1984); *Utter v. South Brookhaven Obstetric & Gynecological Assocs., P.C.*, 135 A.D.2d 811, 522 N.Y.S.2d 915 (1987). See generally Restatement (Second) of Torts § 885(3) comment f (1979).

These considerations have led most jurisdictions recognizing a right of contribution to conclude that a nonsettling defendant's right of contribution from a joint wrongdoer is extinguished by the plaintiff's settlement with and release of such wrongdoer prior to verdict. See, e.g., *Gomes v. Brodhurst*, 394 F.2d 465 (3d Cir.1967); *American Motorcycle Ass'n v. Superior Court*, 20 Cal.3d 578, 146 Cal.Rptr. 182, 578 P.2d 899 (1978); *State ex rel. Deere & Co. v. District Court*, 224 Mont. 384, 730 P.2d 396 (1986); *Theobald v. Angelos*, 44 N.J. 228, 208 A.2d 129 (1965); *Charles v. Giant Eagle Mkts.*, 513 Pa. 474, 522 A.2d 1 (1987); *Kirby Bldg. Sys. v. Mineral Explorations Co.*, 704 P.2d 1266 (Wyo.1985). We believe this approach is consistent with our principles regarding settlements and allocation of liability.

Some jurisdictions have recognized a limited exception to the finality of such settlements where the agreement is collusive in nature by refusing to cut off the nonsettling defendants' right to contribution unless the settlement has been made in "good faith." See *Stifle v. Marathon Oil Co.*, 684 F.Supp. 552 (S.D.Ill.1988), *rev'd on other grounds*, 876 F.2d 552 (7th Cir.1989) (applying Illinois law); *Torres v. State*, 67 A.D.2d 814, 413 N.Y.S.2d 262 (1979). The determination of whether a settlement was made in good faith does not necessarily turn on whether the amount of the settlement accurately reflects the jury's ultimate apportionment of liability. The Appellate Court of Illinois recently stated in *Jachera v. Blake-Lamb Funeral Homes, Inc.*, 189 Ill.App.3d 281, 288, 136 Ill.Dec. 790, 795, 545 N.E.2d 314, 319 (1989):

"Since damages are often speculative and liability uncertain, the amount of a settlement legitimately might be far different from a damage award which results from full litigation. (*O'Connor v.*

Pinto Trucking Serv., 149 Ill.App.3d 911, 103 Ill.Dec. 242, 501 N.E.2d 263 (1986)]). An ensuing jury verdict is not necessarily an accurate measure of good faith in a settlement made prior to trial; at the time of the settlement, it is an unknown factor, so that any analysis based on the subsequent verdict necessarily relies on hindsight. (*[Lowe v. Norfolk & W. Ry. Co.*, 124 Ill.App.3d 80, 79 Ill.Dec. 238, 463 N.E.2d 792 (1984)])."

Accord Noyes v. Raymond, 28 Mass.App. 186, 548 N.E.2d 196 (1990). As we implicitly recognized in the context of "Mary Carter" agreements,* the chief consideration is **805 *606 whether the settlement arrangement substantially impaired the remaining defendants from receiving a fair trial. *State ex rel. Vapor Corp. v. Narick*, 173 W.Va. at 773, 320 S.E.2d at 348. See *Grillis v. Monongahela Power Co.*, 176 W.Va. 662, 346 S.E.2d 812 (1986).

¹⁶¹ The good faith test carries its own safeguards. It is highly unlikely that a plaintiff will make a minimal settlement with a defendant who has the financial ability to pay and whose liability is substantial. We, therefore conclude that a party in a civil action who has made a good faith settlement with the plaintiff prior to a judicial determination of liability is relieved from any liability for contribution. In this case, there is no suggestion that the settlements were not entered into in good faith. Accordingly, we cannot conclude that the trial court committed reversible error in dismissing with prejudice ZMM's cross-claims against Corte and Nutting for contribution.

C. Calculation of Verdict Credit

We confirm our traditional practice of granting a nonsettling defendant a *pro tanto*, or dollar-for-dollar, credit for partial settlements against any verdict ultimately rendered for the plaintiff. See *Tennant v. Craig*, *supra*; *Butler v. Smith's Transfer Corp.*, 147 W.Va. 402, 128 S.E.2d 32 (1962). In *Bradley v. Appalachian Power Co.*, 163 W.Va. at 345, 256 S.E.2d at 886, we stated: "Our comparative negligence rule does not change the right of a joint tortfeasor to obtain a *pro tanto* credit on the plaintiff's judgment for monies obtained by the plaintiff in a settlement with another joint tortfeasor." (Citations

omitted). The *pro tanto* verdict reduction method has also been approved in cases decided after our adoption of comparative negligence. See *Reager v. Anderson*, 179 W.Va. 691, 703, 371 S.E.2d 619, 632 (1988); *Groves v. Compton*, 167 W.Va. 873, 280 S.E.2d 708 (1981).

Our practice with regard to verdict reduction basically comports with Section 4 of the UCATA, which states that a prior settlement by one joint tortfeasor “reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater.”⁹ 12 U.L.A. at 98. Jurisdictions adhering to this approach assert that it (1) encourages the plaintiff to settle by guaranteeing that the portion of the verdict not paid by the settling defendant will be chargeable to the defendant against whom the verdict is returned and (2), at the same time, clearly furthers the strong public policy against the plaintiff recovering more than one complete satisfaction. *Tommy’s Elbow Room, Inc. v. Kavorkian*, 754 P.2d 243 (Alaska 1988); *American Motorcycle Ass’n v. Superior Court*, *supra*; *Department of Transp. v. Webb*, 409 So.2d 1061 (Fla.App.1981), *modified on other grounds*, 438 So.2d 780 (Fla.1983); *Nobriga v. Raybestos-Manhattan, Inc.*, 67 Haw. 157, 683 P.2d 389 (1984); *Mayhew v. Berrien County Road Comm’n*, 414 Mich. 399, 326 N.W.2d 366 (1982); *Gustafson v. Benda*, 661 S.W.2d 11 (Mo.1983); *State ex rel. Deere & Co. v. District Court*, 224 Mont. at 397, 730 P.2d at 405; *Kirby Bldg. Sys. v. Mineral Explorations Co.*, 704 P.2d at 1277.

We recognize that this model for verdict reduction does not take into account the settling party’s actual degree of fault.¹⁰ ****806 *607** However, the importance and accuracy of the jury’s allocation of liability is necessarily undermined by the fact that the settling party, who is out of the case, is not present to defend himself.

^[7] We, therefore, conclude that the defendants in a civil action against whom a verdict is rendered are entitled to have the verdict reduced by the amount of any good faith settlements previously made with the plaintiff by other jointly liable parties. Those defendants against whom the verdict is rendered are jointly and severally liable to the plaintiff for payment of the remainder of the verdict. Where the relative fault of the nonsettling defendants has been determined, they may seek contribution among themselves after judgment if forced to pay more than their allocated share of the verdict.¹¹

The Board’s action against ZMM was based on two theories, i.e., breach of its architectural and engineering contract to design the building and to supervise the construction and negligence in supervising the work.¹² The same damages were proved under both theories. The jury was instructed on both theories¹³ and returned interrogatories which supported both theories. The Board, after the verdict, elected to accept the verdict on the contract theory. Presumably, the Board believed that ZMM could not obtain the benefit of the Corte and Nutting settlements in the contract action because Corte and Nutting were not parties to the Board’s contract with ZMM and vice versa. The trial court apparently adopted this view and held that ZMM was not entitled to a set off against the verdict reflecting the prior settlements.

****807 *608** We have already recognized that the right of inchoate contribution exists in both tort and contract cases. Our definition of the right of contribution in *Sydenstricker* makes no distinction among theories of recovery, but focuses on the common liability of the defendants for plaintiff’s injuries. If those injuries arise from the combined actions of the defendants, they are jointly liable to the plaintiff and may seek inchoate contribution among themselves regardless of the theories of recovery asserted against them individually.

The right of contribution was not designed to provide a windfall for the plaintiff by permitting him to achieve a double recovery for the same injury. Our general law in this area is in line with the general law of damages elsewhere and is set out in Syllabus Point 7 of *Harless v. First Nat’l Bank in Fairmont*, 169 W.Va. 673, 289 S.E.2d 692 (1982):

“It is generally recognized that there can be only one recovery of damages for one wrong or injury. Double recovery of damages is not permitted; the law does not permit a double satisfaction for a single injury. A plaintiff may not recover damages twice for the same injury simply because he has two legal theories.”

See also *Sewell v. Gregory*, 179 W.Va. 585, 371 S.E.2d 82 (1988); *Wiggins v. Eastern Associated Coal Corp.*, 178 W.Va. 63, 357 S.E.2d 745 (1987); *Flannery v. United States*, 171 W.Va. 27, 297 S.E.2d 433, 34 A.L.R.4th 281 (1982).

This rule of damages is independent of the right of contribution. In *Harless*, the plaintiff sought recovery for

D. ZMM’s Entitlement to Verdict Credit

mental anguish and emotional distress as a result of a retaliatory discharge by his employer. He also had a second theory of recovery—the tort of outrageous conduct. The trial court permitted both theories to go to the jury, and the jury awarded separate amounts on both theories. We held that because both theories involved essentially the same items of damages, a duplicate recovery could not be made.

Other jurisdictions have recognized that a joint obligation may arise in both contract and tort, but give rise to a single damage recovery.¹⁴ In *Town of Winnsboro v. Barnard & Burk, Inc.*, 294 So.2d 867 (La.App.), writ refused, 295 So.2d 445 (La.1974), for example, an engineering firm and a testing laboratory tried to escape common liability for defects in the construction of a city street system on the ground that they had entered into separate contracts with the plaintiff city. While conceding that the defendants were not joint obligors, the court held:

“It matters not that the obligation of the defendants to repair the damages and bear the loss arose from separate breaches of separate contracts to do separate things. The jurisprudence recognizes that solidary obligations may result even though the parties are bound under separate contracts and even though one party may be bound under contract and the other through some other basis of law.” 294 So.2d at 886.

Where such joint obligation for damages is found, a credit is allowed for any settlement prior to verdict, as illustrated by *Kassman v. American Univ.*, 178 U.S.App.D.C. 263, 546 F.2d 1029 (1976). There, the Court of Appeals noted that the idea of a credit is premised on the principle that “[t]he office of compensatory damages is to make the plaintiff whole, but certainly not more than whole,” and went on to say:

“There is nothing in logic or precedent which requires limitation of the underlying principle to situations involving joint tortfeasors or to those involving unintentional torts; on the contrary, there is the soundest of reasons to indulge its operation wherever more than one is responsible for a single injury. Where there has been only one injury, the law confers only one recovery, irrespective of the multiplicity of parties whom or theories which the plaintiff pursues.” ****808** ***609** 178 U.S.App.D.C. at 267–68, 546 F.2d at 1033–34. (Footnotes omitted).

The court in *Kassman* found that regardless of the different theories and parties pursued by the plaintiff, “there was but one loss” and that “if the amount paid in settlement reimbursed Kassman for part of the loss established by the verdict, the judgment on that verdict should have been credited with the payment on

settlement.” 546 F.2d at 1035. See *Reliable Tire Distribs., Inc. v. Kelly Springfield Tire Co.*, 607 F.Supp. 361 (E.D.Pa.1985); *J.F. Equip., Inc. v. Owatonna Mfg. Co., Inc.*, 143 Ill.App.3d 208, 98 Ill.Dec. 394, 494 N.E.2d 516 (1986); *Laurendeau v. Kewaunee Scientific Equip. Corp.*, 17 Mass.App. 113, 456 N.E.2d 767 (1983), review denied, 390 Mass. 1106, 459 N.E.2d 824 (1984); *Great Northern Packaging, Inc. v. General Tire & Rubber Co.*, 154 Mich.App. 777, 399 N.W.2d 408 (1986); *Ross v. Holton*, 640 S.W.2d 166 (Mo.App.1982); *TSC Indus., Inc. v. Tomlin*, 743 S.W.2d 169 (Tenn.App.1987). See also Restatement (Second) of Torts § 774A(2) (1979).

The same result was reached in a factual pattern closely analogous to the one here. In *Young Men's Christian Ass'n v. Midland Architects, Inc.*, 174 Ill.App.3d 966, 124 Ill.Dec. 468, 529 N.E.2d 288 (1988), the plaintiff brought suit for breach of contract and breach of warranties against the architects, the general contractor, and the manufacturer of a roof system installed on the plaintiff's building. Prior to trial, the contractor and manufacturer settled and were dismissed from the action. The case proceeded to trial against the architects on a breach of contract theory and resulted in a verdict in favor of the plaintiff. The architects then sought to have the verdict reduced by the amount of the pretrial settlements.

In ruling that the trial court erred in its manner of reducing the verdict, the Illinois appellate court relied on cases involving joint tortfeasors and stated:

“This is a case where the actions of all the defendants (the architects, the general contractor, and the roofing manufacturer) caused a single, indivisible injury to plaintiff as a result of the construction and installation of a defective roof.

“The law is well settled that, where there is a single and indivisible injury, the damages are inseparable and any amounts received from any of the defendants must be deducted from the total damages sustained. (*Weaver v. Bolton* (1965), 61 Ill.App.2d 98, 209 N.E.2d 5.) Applicable to the case at bar is the holding in *Eberle v. Brenner* (1987), 153 Ill.App.3d 700, 702 [106 Ill.Dec. 144, 146, 505 N.E.2d 691, 693], where the court said:

‘An injured person is entitled to one full compensation for his injuries, and a double recovery for the same injury is against public policy. [Citation.] Thus, a plaintiff who has recovered for his damages should have no basis to complain because a defendant benefited from a setoff.’ ”

174 Ill.App.3d at 970, 124 Ill.Dec. at 471, 529 N.E.2d

at 291.

See also *Morley v. Cohen*, 888 F.2d 1006 (4th Cir.1989) (applying Maryland law); *Harris v. Union Elec. Co.*, 846 F.2d 482 (8th Cir.1988); *Raben-Pastal v. City of Coconut Creek*, 545 So.2d 885 (Fla.App.1989); *Reeves v. Dixie Brick, Inc.*, 403 So.2d 792 (La.App.1981); *Doundoulakis v. Town of Hempstead*, 42 N.Y.2d 440, 398 N.Y.S.2d 401, 368 N.E.2d 24 (1977); *South Union, Ltd. v. George Parker & Assocs.*, 29 Ohio App.3d 197, 29 O.B.R. 241, 504 N.E.2d 1131 (1985); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex.1984).

^[8] We believe that under the foregoing legal principles, a verdict reduction reflecting the settlements was required here. The Board suffered a single, indivisible loss attributable to the combined actions of the multiple defendants in designing and constructing the high school. The defendants therefore shared a common liability for the damages suffered by the Board. The evidence and measure of compensatory damages was the same under both theories of liability. In essence, the Board merely asserted alternative grounds for the same ****809 *610** relief. It is, therefore, entitled to only one compensatory damage award.

^[9] Under these circumstances, where there is a single indivisible loss arising from the actions of multiple parties who have contributed to the loss, the fact that different theories of liability have been asserted against them does not foreclose their right of contribution *inter se* or prevent them from obtaining a verdict credit for settlements made with the plaintiff by one or more of those jointly responsible. Accordingly, we conclude that ZMM was, in fact, entitled to reduction of the verdict to reflect prior payments by Corte and Nutting in satisfaction of the Board's loss.¹⁵

II.

^[10] On cross-assignment of error, the Board contends that the trial court erred in refusing to grant its post-judgment motion for prejudgment interest on the verdict. The trial court granted the Board post-judgment interest on the \$1,000,000 verdict from the verdict date, but held that since the Board had elected to have judgment entered on the breach of contract theory, it was not entitled to prejudgment interest.

Admittedly, there is some confusion in our cases with regard to prejudgment interest in contract cases. In *Bond*

v. City of Huntington, 166 W.Va. 581, 596, 276 S.E.2d 539, 547 (1981), for example, we commented that W.Va.Code, 56-6-27 (1923),¹⁶ embodied the common law principle that in contract claims, interest was awarded as part of the compensatory damages "where the principal is certain or can be rendered certain by some reasonable calculation." See *Bischoff v. Francesa*, 133 W.Va. 474, 56 S.E.2d 865 (1949); *Cresap v. Brown*, 82 W.Va. 467, 96 S.E. 66 (1918). In *Bond*, however, we were concerned primarily with the award of interest in a tort action in the absence of an authorizing statute. A cursory reading of W.Va.Code, 56-6-27, clearly demonstrates that an award of interest in a contract action is not limited to cases in which the amount in question is undisputed. Interest is allowable "in any action founded on contract." As we indicated in Syllabus Point 1 of *Corte Co., Inc. v. County Comm'n of McDowell County*, 171 W.Va. 405, 299 S.E.2d 16 (1982): "Pursuant to W.Va.Code, 56-6-27 [1931], a county commission may be liable, in an action founded on contract, for interest on the principal due, or any part thereof, at the time of trial, after allowing all proper credits, payments and sets off." Such awards are intended to compensate the plaintiff for the losses he could have avoided or money he could have earned if the contract obligation had been timely performed.

Here, the jury found the Board's loss to be one million dollars. ZMM does not dispute that an award of prejudgment interest would have been proper on a tort judgment. In *Arcuri v. Great Am. Ins. Co.*, 176 W.Va. 211, 219, 342 S.E.2d 177, 185 (1986), we held that the plaintiffs, who had sued their fire and hazard insurers in both contract and tort for delay in payment of insurance proceeds, were entitled to interest on the proceeds of the policies "whether the action against the insurers is for breach of contract or for the tort of bad ****810 *611** faith delay in payment." We believe the Board is entitled to no less.

On remand, the trial court should recall the rate of interest spelled out in Syllabus Point 7 of *Bell v. Inland Mut. Ins. Co.*, 175 W.Va. 165, 332 S.E.2d 127, *cert. denied sub nom. Camden Fire Ins. Ass'n v. Justice*, 474 U.S. 936, 106 S.Ct. 299, 88 L.Ed.2d 277 (1985):

"Prejudgment interest accruing on amounts as provided by law prior to July 5, 1981 [W.Va.Code, 56-6-27 and -29 [1931]] is to be calculated at a maximum annual rate of six percent under W.Va.Code, 47-6-5(a) [1974], and thereafter, at a maximum annual rate of ten percent in accordance

with the provisions of *W.Va.Code*,
56-6-31 [1981].”

Weimer-Godwin v. Board of Educ. of Upshur County, 179 W.Va. 423, 428, 369 S.E.2d 726, 731 (1988). Prejudgment interest should be calculated from the date on which the cause of action accrued. *See Syllabus Point 2, Grove v. Myers*, 181 W.Va. 342, 382 S.E.2d 536 (1989).

Although from the record before us, it is difficult to pinpoint the precise date when the cause of action arose, it would appear that the major damage had occurred at least by July, 1983. Prejudgment interest should be awarded on the entire \$1,000,000 verdict from the date of the cause of action.¹⁷ Because the Board received the Corte and Nutting settlements less than one month before the jury verdict, there is no necessity to adjust the prejudgment interest for the settlement amounts. Finally, the principal on which the award of post-judgment interest will be calculated should be arrived at by subtracting the dollar amount of all settlements from the \$1,000,000 verdict plus prejudgment interest.

III.

ZMM next contends that the trial court erred in not granting its motion for a mistrial. The motion, made after the jury had retired to deliberate, was based on allegedly improper comments made by counsel for the Board in closing arguments¹⁸ indicating that the attorney “believed in” his client’s case, that witnesses for ZMM had been unfriendly to the Board’s witnesses, and that one ZMM witness had been “winking at the ladies on the jury” while counsel’s back was turned.

^[11] In Syllabus Point 2 of *Jenrett v. Smith*, 173 W.Va. 325, 315 S.E.2d 583 (1983), we stated:

“ ‘Though wide latitude is accorded counsel in arguments before a jury, such arguments may not be founded on facts not before the jury, or inferences which must arise from facts not before the jury.’ Syl. pt. 3, *Crum v. Ward*, 146 W.Va. 421, 122 S.E.2d 18 (1961).”

Certainly, the comments of the Board’s attorney stated matters not in evidence. In Syllabus Point 4 of *Moore, Kelly & Reddish, Inc. v. Shannondale, Inc.*, 152 W.Va. 549, 165 S.E.2d 113 (1968), we recognized:

“Whether a motion for a mistrial
should be sustained or overruled is

a matter which rests within the trial court’s discretion and the action of the trial court in ruling on such a motion will not be cause for reversal on appeal unless it clearly appears that such discretion has been abused.”

We have also held on several occasions that improper personal remarks of counsel do not always require reversal of a judgment. *See Jenrett v. Smith, supra*; *Leftwich v. Wesco Corp.*, 146 W.Va. 196, 119 S.E.2d 401 (1961), *overruled on other grounds, Bradley v. Appalachian Power Co., supra*.

^[12] *612 Reviewing the record as a whole, we cannot say that counsel’s improper comments **811 were such as to mandate the granting of a mistrial. Accordingly, we find no abuse of discretion by the trial court which would warrant reversal of the judgment for refusal to grant a mistrial.

IV.

^[13] ZMM also raises several assignments of evidentiary error. We are guided in our inquiry by the well-settled rule stated in Syllabus Point 7 of *State v. Miller*, 175 W.Va. 616, 336 S.E.2d 910 (1985):

“ ‘Rulings on the admissibility of evidence are largely within a trial court’s sound discretion and should not be disturbed unless there has been an abuse of discretion.’ *State v. Louk*, 171 W.Va. 639, 301 S.E.2d 596, 599 (1983).’ Syllabus Point 2, *State v. Peyatt*, 173 W.Va. 317, 315 S.E.2d 574 (1983).”

See West Virginia Dep’t of Highways v. Mountain, Inc., 167 W.Va. 202, 279 S.E.2d 192 (1981); *Casto v. Martin*, 159 W.Va. 761, 230 S.E.2d 722 (1976).

A.

ZMM first contends that the trial court erred in allowing J.E. Caffrey, a consulting engineer, to testify as an expert witness on matters of structural engineering and design. Mr. Caffrey had been educated as a mining engineer, but had over twenty-five years experience supervising various kinds of engineers and construction. Mr. Caffrey stated that his experience had made him familiar with the

construction methods used in building the high school. The court qualified him to testify as an expert as to structural matters.

^[14] ^[15] In Syllabus Point 3 of *Ventura v. Winegardner*, 178 W.Va. 82, 357 S.E.2d 764 (1987), we stated:

“ ‘If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.’ W.Va.R.Evid. 702.”

See *West Virginia Dep’t of Highways v. Thompson*, 180 W.Va. 114, 375 S.E.2d 585 (1988). In *Ventura*, we recognized that Rule 702 “liberally allows a witness to testify as an expert[.]” 178 W.Va. at 86, 357 S.E.2d at 768. Federal court decisions interpreting Rule 702 of the Federal Rules of Evidence, which is identical to our rule, hold that the witness may be qualified as an expert by any one of the means listed, i.e., knowledge, skill, experience, training, or education. *Friendship Heights Assocs. v. Vlastimil Koubek, A.I.A.*, 785 F.2d 1154 (4th Cir.1986); *Garrett v. Desa Indus., Inc.*, 705 F.2d 721 (4th Cir.1983); *Dychalo v. Copperloy Corp.*, 78 F.R.D. 146 (E.D.Pa.), *aff’d*, 588 F.2d 820 (3d Cir.1978). See generally 3 J. Weinstein & M. Berger, *Weinstein’s Evidence* ¶ 702[04] (1988); F. Cleckley, *Handbook on Evidence for West Virginia Lawyers* § 7.1(B) at 419–20 (2d ed. 1986). Adoption of W.Va.R.Evid. 702 did not affect the well-settled rule of our prior law which was stated in Syllabus Point 4 of *Hall v. Nello Teer Co.*, 157 W.Va. 582, 203 S.E.2d 145 (1974):

“ ‘Whether a witness is qualified to state an opinion is a matter which rests within the discretion of the trial court and its ruling on that point will not ordinarily be disturbed unless it clearly appears that its discretion has been abused.’ Point 5, syllabus, *Overton v. Fields*, 145 W.Va. 797 [117 S.E.2d 598 (1960)].”

See *State v. M.M.*, 163 W.Va. 235, 256 S.E.2d 549 (1979); *Byrd v. Virginian Ry. Co.*, 123 W.Va. 47, 13 S.E.2d 273 (1941). See generally 3 Weinstein & Berger, *supra*.

^[16] The evidence here demonstrated that although Mr. Caffrey had not been educated as a structural engineer, he had many years experience in the construction business and was familiar with the methods used in this instance. In view of this evidence, we are unwilling to say that the trial court abused its discretion in allowing Mr. Caffrey to testify as an expert on structural matters.

****812 *613 B.**

^[17] ZMM next contends that the trial court erred in not allowing it to present the testimony of certain witnesses on the issue of damages. These witnesses were originally secured by Corte, who had taken the primary pretrial responsibility for presentation of evidence regarding damages. As part of its settlement with the Board, however, Corte agreed not to “make available to the remaining parties in the civil action ... any expert witnesses named by it in connection with said civil action.”

When ZMM attempted to call the Corte witnesses at trial, the trial court ruled that they were “expert witnesses” within the meaning of the settlement agreement and refused to make them available to testify for ZMM. The court did grant ZMM a recess to attempt to obtain an expert of its own, but when trial resumed five days later, ZMM asserted that it had been unable to locate any witnesses who could offer the same testimony.¹⁹

This is not the first time that we have had a claim of this nature. In *Riggle v. Allied Chem. Corp.*, 180 W.Va. 561, 378 S.E.2d 282 (1989), one of the defendants settled with the plaintiffs during the first day of trial. This left the remaining defendant without the benefit of the settling defendant’s experts. We rejected the nonsettling defendant’s claim of error, stating:

“Appellant had two possible courses of action to protect itself against a settlement between plaintiffs and Allied. Given the substantial evidence that appellant was at least partially at fault and the existence of the indemnity provision in appellant’s contract with Allied, appellant would have been well advised to settle the case itself. Alternatively, if appellant wanted to fight plaintiffs’ claim, it could have prepared its own case rather than relying on Allied’s experts. Appellant chose neither course of action and has only itself to blame for the result.” 180 W.Va. at 569, 378 S.E.2d at 290.

It is obvious to any sophisticated trial lawyer that in litigation involving multiple defendants there is the likelihood that settlements will occur before trial. To rely on another party defendant’s witnesses without some formal agreement as to shared use is to invite the consequences that arose in *Riggle* and in the present case. The end result is that no error can be claimed.

C.

Finally, ZMM contends that the trial court erred in not allowing ZMM's witnesses to testify as to their conversations with John Drosick, Superintendent of McDowell County Schools at the time the construction was being planned. Mr. Drosick had died prior to trial. When Mr. Zando attempted to testify as to Mr. Drosick's statements to him concerning the site of the high school, counsel for the Board objected on grounds that the testimony was hearsay and violated W.Va.Code, 57-3-1 (1937),²⁰ also known as the Dead Man's Statute. The circuit court sustained the objection.

^[18] ZMM contends that the trial court erred in excluding this testimony. We agree that W.Va.Code, 57-3-1, does not prevent the admission of the testimony in question. In Syllabus Point 10 of *Moore v. Goode*, 180 W.Va. 78, 375 S.E.2d 549 (1988), we outlined its general operation:

"To summarize the basic operation of the Dead Man's Act, W.Va.Code, 57-3-1, a concurrence of three general conditions must be met in order to bar the witness's ****813 *614** testimony. First, the testimony must relate to a personal transaction with a deceased or insane person. Second, the witness must be a party to the suit or interested in its event or outcome. Third, the testimony must be against the deceased's personal representative, heir at law, or beneficiaries or the assignee or committee of an insane person."

It is apparent that the third condition is not met in this case. This suit was not against Mr. Drosick's personal representative.

^[19] Moreover, we have traditionally held that a witness can testify about the statements of a deceased agent when the suit is against the principal. A rather similar situation existed in *Board of Educ. of Elk Dist. v. Harvey*, 70 W.Va. 480, 74 S.E. 507 (1912), where the plaintiff, who had sued the school board over the ownership of a school building, testified to a conversation he had had with a member of the school board who subsequently died. We held in Syllabus Point 1 that this testimony did not transgress the Dead Man's Act: "A party to a suit is competent to testify in his own behalf, against a board of education in relation to a personal transaction, between himself and a deceased member of such board." See also

Cross v. State Farm Mut. Auto. Ins. Co., 182 W.Va. 320, 387 S.E.2d 556 (1989); *Keatley v. Hanna Chevrolet Co.*, 121 W.Va. 669, 6 S.E.2d 1 (1939).

^[20] ^[21] Finally, such evidence was not inadmissible as hearsay. Both Rule 801(d)(2)(D) of the West Virginia Rules of Evidence²¹ and our prior law recognize that statements made by an agent or employee within the scope of his agency or employment and during the existence of the agency or employment relationship are not hearsay and are admissible against a principal or employer who is a party to the litigation. See *Coates v. Montgomery Ward & Co.*, 133 W.Va. 455, 57 S.E.2d 265 (1949); *Cleckley*, *supra* § 8.5(E) at 481-82.

^[22] ^[23] Although we conclude that the trial court erred in excluding the evidence of Mr. Drosick's statement, ZMM fails to demonstrate the relevance of this evidence or how the exclusion of it at trial was prejudicial to its case. As the Court stated in Syllabus Point 5 of *Maxwell v. Kent*, 49 W.Va. 542, 39 S.E. 174 (1901):

"When evidence is excluded and the action of the court in excluding it is relied upon in the appellate court, it must appear on the record that the evidence rejected was or would have been relevant, material and important to make its rejection available as a ground of error."

See *Papenhaus v. Combs*, 170 W.Va. 211, 292 S.E.2d 621 (1982); *Crawford v. Roeder*, 169 W.Va. 158, 286 S.E.2d 273 (1982). In view of ZMM's failure to make such a showing, we cannot say that the exclusion of this evidence was reversible error.

V.

For all the reasons stated above, we find no error warranting reversal of the jury's verdict, but we do conclude that the trial court erred in entering judgment against the defendant for the full amount of the verdict. We also agree that the Board is entitled to prejudgment interest. We, therefore, set aside the judgment of the Circuit Court of Kanawha County and remand the case to that court for entry of judgment in accordance with the principles enunciated herein.

Affirmed, in part, Reversed, in part, and Remanded.

Parallel Citations

390 S.E.2d 796, 59 Ed. Law Rep. 1179

Footnotes

- 1 As we earlier stated, ZMM initially brought Corte and Nutting into the litigation by third-party complaint. *See* W.Va.R.Civ.P. 14. When the Board subsequently amended its complaint to name Corte and Nutting as defendants, ZMM, in its answer, filed cross-claims against them on the same grounds. *See* W.Va.R.Civ.P. 13(g). The law discussed herein is equally applicable to both third-party complaints and cross-claims.
- 2 W.Va.Code, 55-7-13, provides: "Where a judgment is rendered in an action ex delicto against several persons jointly, and satisfaction of such judgment is made by any one or more of such persons, the others shall be liable to contribution to the same extent as if the judgment were upon an action ex contractu."
- 3 The concept of contribution is not foreign to those whose joint obligations arise by contract. W.Va.Code, 55-7-13, suggests that a right of contribution after a joint judgment was recognized at common law in contract actions. For the text of W.Va.Code, 55-7-13, see note 2, *supra*. There is no question that this was the prevailing rule at common law. *E.g.*, *Estate of Bayliss v. Lee*, *supra*; *Cost v. MacGregor*, 124 W.Va. 204, 19 S.E.2d 599, 140 A.L.R. 882 (1942); *Gooch v. Gooch*, 70 W.Va. 38, 73 S.E. 56 (1911). *See generally* 18 Am.Jur.2d *Contribution* § 32 (1985).
It also appears that an inchoate right of contribution could be asserted in equity on a joint contract obligation. 18 Am.Jur.2d *Contribution* § 86 (1985). Undoubtedly, the earlier unwillingness of courts to permit such a claim at law arose from the rigidity of the common law forms of pleading. With the merger of law and equity into one form of civil action, such procedural impediments no longer exist. *See* W.Va.R.Civ.P. 2.
- 4 After discussing the question at some length, we concluded in Syllabus Point 3 of *Sitzes v. Anchor Motor Freight, Inc.*, *supra*: "As between joint tortfeasors, a right of comparative contribution exists *inter se* based upon their relative degrees of primary fault or negligence."
- 5 This result is statutorily mandated in medical malpractice cases. W.Va.Code, 55-7B-9(c) (1986), provides, in pertinent part: "No right of contribution exists against any defendant who entered into a good faith settlement with the plaintiff prior to the jury's report of its findings to the court or the court's findings as to the total dollar amount awarded as to damages."
- 6 Section 4 of the UCATA provides:
"When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
"(a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and
"(b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor." 12 U.L.A. at 98 (1975).
- 7 Section 6 of the UCFA provides:
"A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, determined in accordance with the provisions of Section 2." 12 U.L.A. at 52 (Supp.1989).
- 8 In such a settlement, the settling defendant agrees to help the plaintiff under the following terms:
"(1) The agreeing defendant(s) must remain in the action in the posture of defendant(s); (2) The agreement must be kept secret; (3) The agreeing defendant(s) guarantee to the plaintiff a certain monetary recovery regardless of the outcome of the action; and (4) The agreeing defendant(s)' liability is decreased in direct proportion to the increase in the nonagreeing defendant(s)' liability." *Reager v. Anderson*, 179 W.Va. 691, 703, 371 S.E.2d 619, 629 (1988). (Footnote omitted).
- 9 For the complete text of Section 4 of the UCATA, see note 6, *supra*.
- 10 Section 2 of the UCFA provides for reduction of the verdict by the percentage of negligence the jury, in allocating fault among all of the responsible parties, attributed to the settlor. Jurisdictions adhering to this model do not require the settlement to be in "good faith." *See Gomes v. Brodhurst*, *supra*; *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex.1984).
The UCFA model has drawbacks, however. If the amount of the settlement is less than the settling party's *pro rata* share of the

verdict, the plaintiff absorbs the loss. He cannot collect the difference from the remaining defendants, and they cannot be required to pay more than their individual allocate shares. This procedure essentially destroys the concept of joint and several liability. *Dobson v. Camden*, 705 F.2d 759 (5th Cir.1983); *American Motorcycle Ass'n v. Superior Court*, *supra*; *Glidden v. German*, 360 N.W.2d 716 (Iowa 1984); *State ex rel. Deere & Co. v. District Court*, *supra*. If, on the other hand, the plaintiff obtains an amount in settlement greater than the percentage of damages attributable to the settling party, he may keep the difference as a "windfall." The other parties must still pay their allocate shares of the verdict. This permits the plaintiff a recovery in excess of the jury verdict. *See Wadle v. Jones*, 312 N.W.2d 510 (Iowa 1981); *Kirby Bldg. Sys. v. Mineral Explorations Co.*, *supra*.

The perceived equities or inequities between these models, as well as other statutory variations, is a subject of ongoing academic debate. For a West Virginia sampling, see J. Stoneking, *Beyond Bradley: A Critique of Comparative Contribution in West Virginia and Proposals for Legislative Reform*, 89 W.Va.L.Rev. 167, 184–87 (1986); J. Lewin, *Comparative Negligence in West Virginia: Beyond Bradley to Pure Comparative Fault*, 89 W.Va.L.Rev. 1039, 1045–51 (1987). *See generally Reager v. Anderson*, 179 W.Va. at 703 n. 9, 371 S.E.2d at 631 n. 9.

11 In *Reager*, we recognized that a settling defendant who remains in the case is susceptible to contribution claims where his settlement was less than his allocate share of joint liability. 179 W.Va. at 704, 371 S.E.2d at 632. In such a case, the settling defendant becomes bound by the joint judgment under W.Va.Code, 55–7–13. For the text of W.Va.Code, 55–7–13, see note 2, *supra*.

12 In Prosser & Keeton, *The Law of Torts* § 92 at 655 (5th ed. 1984), this rather telling observation is made:

"The distinction between tort and contract liability, as between parties to a contract, has become an increasingly difficult distinction to make. It would not be possible to reconcile the results of all cases. The availability of both kinds of liability for precisely the same kind of harm has brought about confusion and unnecessary complexity. It is to be hoped that eventually the availability of both theories—tort and contract—for the same kind of loss with different requirements both for the claimant's *prima facie* case and the defendant's affirmative defenses will be reduced in order to simplify the law and reduce the costs of litigation."

13 The instructions advised the jury that the proper measure of compensatory damages under either theory was "the cost of repairing the defects proximately caused by the architect/engineer's negligence, if any, and/or breach of contract, if any[.]" plus "all other expenses stemming from the injury in accordance with the law, including the loss of use of the gym during the repair." The jury was also instructed that "damages for breach of contract are intended to put the non-breaching party in as good a position as it was as if the promises contained in the contract were kept." Although the issue of punitive damages was submitted to the jury, none were awarded.

14 In Syllabus Point 1, in part, of *Gamble v. Main*, 171 W.Va. 369, 300 S.E.2d 110 (1983), we recognized that inherent in a construction contract is the implied warranty that it will be "constructed by the builder in a workmanlike manner."

15 The Board contends the jury has already performed this verdict reduction function. At trial, however, the jury was not advised of the amounts of the Corte and Nutting settlements, only of their existence and that Corte and Nutting were no longer parties to the case. The jury was instructed to return a verdict which would fairly compensate the Board for its damages if they believed ZMM was liable. The Board produced evidence of damages of between \$1.5 and \$1.9 million. However, ZMM developed evidence that the expert responsible for these estimates relied on specifications provided by the Board rather than on an independent assessment of the damage. There was also evidence that the repair work could have been accomplished at a lesser cost. Under these circumstances, we cannot accept the Board's factual argument that the jury deducted the settlements, the amounts of which were unknown to it, before rendering the verdict of \$1,000,000.

16 W.Va.Code, 56–6–27, provides:

"The jury, in any action founded on contract, may allow interest on the principal due, or any part thereof, and in all cases they shall find the aggregate of principal and interest due at the time of the trial, after allowing all proper credits, payments and sets-off; and judgment shall be entered for such aggregate with interest from the date of the verdict."

17 The Board's election to accept the jury verdict on the contract theory, as earlier indicated, does not preclude the settlement offsets. It does, however, preclude reduction of the verdict to reflect the 5 percent contributory negligence the jury allocated to the Board in the negligence action.

18 ZMM also alleges that improper remarks were made by the Board's attorney in his opening statement. No objection was made at the time of the alleged impropriety, however, nor was the issue raised at the time of the motion for a mistrial. ZMM may not,

therefore, assert the matter now. *Ritz v. Kingdon*, 139 W.Va. 189, 79 S.E.2d 123 (1953); *Yuncke v. Welker*, 128 W.Va. 299, 36 S.E.2d 410 (1945).

19 It does not appear that ZMM attempted to subpoena Corte's witnesses in order to challenge the validity of the settlement contract language as to unavailability.

20 W.Va.Code, 57-3-1, provides, in pertinent part:

"No party to any action, suit or proceeding, nor any person interested in the event thereof, nor any person from, through or under whom any such party or interested person derives any interest or title by assignment or otherwise, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the time of such examination, deceased, insane or lunatic, against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor of such person, or the assignee or committee of such insane person or lunatic."

21 W.Va.R.Evid. 801(d)(2)(D) provides, in pertinent part:

"(d) *Statements Which are not Hearsay*.—A statement is not hearsay if—

* * * * *

"(2) Admission by Party—Opponent.—The statement is offered against a party and is ... (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship[.]"

2007 WL 2306947

Only the Westlaw citation is currently available.
United States District Court,
D. North Dakota,
Northeastern Division.

ESTATE OF Cody Alan HALAMA, By and through
its Administrator, Scott Rodney Halama, and Scott
Rodney Halam, Individually, Plaintiffs,

v.

Murray BARKMAN, Individually, and d/b/a
Barkman Transport, and Ralph William Eslinger,
Defendants.

Cory D. Knust, Individually and Cory D. Knust, as
Administrator of the Estate of Heather Ann Knust,
Deceased, Plaintiffs,

v.

Ralph Eslinger, Murray Barkman, d/b/a Barkman
Transport, and Dwight Barkman, Defendants.

Civil Nos. 3:06cv53, 2:06cv63. | Aug. 8, 2007.

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MEMORANDUM AND ORDER

KAREN K. KLEIN, United States Magistrate Judge.

*1 The following order memorializes the court's rulings
on the discovery motions addressed during the hearing on
July 13, 2007.

Deposition of Knust Experts

The parties to this consolidated action engaged in
settlement discussions on June 4, 2007. Plaintiff Knust's

case settled, plaintiff Halama's did not. As part of the
settlement, plaintiff Knust and defendants agreed that
Knust's experts cannot be used by plaintiff Halama in his
case against the defendants. Plaintiff Halama moved to
take the deposition of Knust's experts William Frank and
Dr. Stanley Sangdahl, arguing first that the rules do not
allow defendants to "lock up" the opinions of expert
witnesses, and secondly that Halama reserved the right to
call expert witnesses disclosed by other parties in the
litigation in his Rule 26(A)(2) Disclosures and Answers to
Interrogatories.

Defendants oppose Halama's motion, asserting that
Knust's experts are not qualified to testify as experts, and
that defendants "placed value on excluding any use of
Knust's experts by anyone else, including
Halama." *Defendants' Memorandum in Opposition to
Plaintiffs Halama's Motion to Allow Testimony of Knust
Experts and Other Discovery Issues*, at 2 (Doc. # 120).
Plaintiff Knust also weighed in on the issue, asserting that
Halama declined the opportunity to jointly retain expert
witnesses and share in the cost and should not now be
permitted to "utilize work product and opinions
developed in connection with the prosecution of separate
claims...." *Plaintiff Cory Knust's Response to Plaintiff
Scott Halama's Motion for Order Allowing Depositions of
Plaintiff Knust's Expert Witnesses*, at 2 (Doc. # 123).

The court conditionally denied plaintiff Halama's request,
finding that Halama is not entitled to receive benefit from
Knust's experts given his refusal to participate in the
concomitant costs, and further that the subject matter of
the experts duplicates, to some extent, those Halama is
prepared to offer. The court's ruling is not changed by its
review of *Scott, Inc. v. McIlhany*, 798 S.W.2d 556
(Tex.1990), cited by Halama during the discovery
conference. Rather, the court finds persuasive the
reasoning in *Wolt v. Sherwood, A Div. of Harsco Corp.*,
828 F.Supp. 1562 (D.Utah 1993), wherein the court
rejected the public policy considerations raised in *Scott,
Inc.* in favor of the rationale espoused by the West
Virginia Supreme Court in *Board of Education v. Zando,
Martin & Milstead*, 182 W.Va. 597, 390 S.E.2d 796
(1990):

The West Virginia Supreme Court found the settlement
agreement acceptable and rejected the architect's claim.
The court stated that defendants in a multi-party case
should retain their own experts, and not rely upon other
defendants. The court noted:

"[i]t is obvious to any sophisticated trial lawyer that
in litigation involving multiple defendants there is a
likelihood that settlement will occur before trial. To

rely on another party defendant's witnesses without some formal agreement as to the shared use is to invite the consequences that arose ... in the present case."

*2 *Wolt v. Sherwood, A Division of Harsco Corp.*, 828 F.Supp. 1562, 1567 (C.D. UT 1993)(quoting *Board of Educ. v. Zando, Martin & Milstead, Inc.*, 182 W.Va. 597, 390 S.E.2d 796, 812 (1990)). Therefore, Plaintiff Halama's Motion for Extension of Court Deadlines Concerning Discovery and Order Allowing Depositions of Knust Experts (Doc. # 117) is **DENIED**.

Employment Records

Although defendant Eslinger contends his employment records are not relevant to this proceeding, his counsel has continued to produce them upon receipt. The court will not order additional time for the production of employment records without specific information concerning the need for such time. However, if highly relevant information develops from incoming employment records, plaintiff Halama may request appropriate relief.

Mental Health Records

Reiterating that the court has never stated the mental condition of defendant Eslinger is relevant, the court

nevertheless permitted limited discovery of his military medical records for impeachment purposes. Plaintiff Halama now seeks to obtain mental health records for treatment Eslinger obtained in Des Moines, Iowa. Counsel argued defendant Eslinger's qualification to be a truck driver is at issue, as well as the truthfulness of his statements on his CDL application. Plaintiff's request is **DENIED** based on the marginal relevancy of defendant Eslinger's mental condition, the significant issue of privilege, and the existence of other testimony.

Cell Phone Records/Deposition

Plaintiff Halama requests leave to take the deposition of defendants' cell phone provider. Apparently defendant Eslinger testified that he left his cell phone with his wife in January 2006. Counsel's review of the phone records indicate the phone was being used on the day of the accident. Plaintiff wants to depose a cell phone company representative to determine the truthfulness of defendant Eslinger's statements, specifically whether or not he had the phone and where he was when it was used. Defendant objected, arguing plaintiff had the records as early as October 2006. Plaintiff's motion to take the telephone deposition of a representative of the cell phone company is **GRANTED**.

IT IS ORDERED.

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196 F.Supp.2d 1023
United States District Court,
E.D. California.

FMC CORPORATION, Plaintiff,
v.
VENDO COMPANY, et al., Defendants.
And Related Third-Party Claims

No. CIV.F-00-5295 OWW LJO. | April 17, 2002.

In contribution action under Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and state law, defendants filed third party complaints seeking contribution from railroad. On railroad's motion for summary judgment and defendants' motion to quash railroad's proposed subpoenas of plaintiff's experts, the District Court, Wanger, J., held that: (1) defendants could not maintain third party contribution action against railroad to recover costs paid pursuant to settlement agreement with plaintiff; (2) defendants could seek contribution from railroad for costs they incurred in response to state or federal administrative agency directives; and (3) railroad was not entitled to depose or call as witnesses at trial experts designated by plaintiff.

Motions granted in part, and denied in part.

West Headnotes (11)

[1] **Federal Civil Procedure**

⚙️ Pretrial Order

Carelessness is not basis for permitting modification of scheduling conference. Fed.Rules Civ.Proc.Rule 16(b), 28 U.S.C.A.

Cases that cite this headnote

[2] **Federal Civil Procedure**

⚙️ Pretrial Order

Decision to modify scheduling order is within

broad discretion of district court. Fed.Rules Civ.Proc.Rule 16(b), 28 U.S.C.A.

Cases that cite this headnote

[3] **Environmental Law**

⚙️ Joint and several liability; divisibility

Single harm may be divisible among several potentially responsible parties (PRP), for purposes of determining contribution liability under CERCLA, if it is possible to discern degree to which different parties contribute to damage. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 113(f), 42 U.S.C.A. § 9613(f).

1 Cases that cite this headnote

[4] **Environmental Law**

⚙️ Contribution and indemnity; allocation of liability

Owner's action against potentially responsible parties (PRPs) under CERCLA to recover for response costs incurred in remediating contamination of site was contribution action, not direct cost recovery action, and thus settling PRPs could not maintain third party contribution action against non-settling PRP for reimbursement of payments made to owner in settlement of its claims against them, even if owner's claims against non-settling PRP were divisible from its own responsibility for contamination such that it could have brought direct cost recovery action against non-settling PRP, absent evidence that owner acted in collusion with non-settling PRP to maximize settling PRPs' liability; settling PRPs were liable only for their fair and several shares of site liability. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§107(a), 113(f), 42 U.S.C.A. §§ 9607(a), 9613(f).

2 Cases that cite this headnote

[5]

Environmental Law

—Contribution and indemnity; allocation of liability

Defendants in CERCLA contribution action were entitled to seek contribution from other potentially responsible party (PRP) for costs they incurred in response to state or federal administrative agency directives, even if PRP was not liable to defendants for original plaintiff's claims under CERCLA relating to its response costs, where PRP was potentially liable to defendants for plaintiffs' state law claims for which defendant could be held jointly and severally liable, and claims were inextricably intertwined. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 113(f), (g)(2), 42 U.S.C.A. § 9613(f), (g)(2); Fed.Rules Civ.Proc.Rule 14(a), 28 U.S.C.A.

3 Cases that cite this headnote

[6]

Federal Civil Procedure

—Liability of third party in general

Impleader may be appropriate where third-party defendant is potentially liable to third-party plaintiff for damages to extent necessary to put third-party plaintiff in position he would have been in absent alleged wrongdoing by third-party defendant. Fed.Rules Civ.Proc.Rule 14(a), 28 U.S.C.A.

Cases that cite this headnote

[7]

Environmental Law

—Contribution and indemnity; allocation of liability

Under California law, defendants in hazardous waste contribution action were entitled under

Carpenter-Presley-Tanner Hazardous Substance Account Act (HSAA) to seek contribution from other potentially responsible party (PRP) for costs they incurred in response to state or federal administrative agency directives, even if PRP was not liable to defendants for original plaintiff's claims relating to its response costs. West's Ann.Cal.Health & Safety Code § 25363(e).

3 Cases that cite this headnote

[8]

Environmental Law

—Federal preemption

States

—Environment; nuclear projects

CERCLA did not preempt settling potentially responsible parties' (PRPs) state-law causes of action against non-settling PRP concerning cleanup of hazardous materials. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 302(d), 42 U.S.C.A. § 9652(d).

Cases that cite this headnote

[9]

Federal Civil Procedure

—Persons subject

Exceptional circumstances sufficient to justify opposing party's discovery of non-testifying expert's facts and opinions may exist where (1) object or condition at issue is destroyed or has deteriorated after non-testifying expert observes it but before moving party's expert has opportunity to observe it; or (2) there are no other available experts in same field or subject area. Fed.Rules Civ.Proc.Rule 26(b)(4)(B), 28 U.S.C.A.

17 Cases that cite this headnote

[10]

Federal Civil Procedure

🔑 Persons Whose Depositions May Be Taken
Witnesses

🔑 Persons Who May Be Required to Appear
and Testify

Non-settling potentially responsible party (PRP) in CERCLA contribution action was not entitled to depose or call as witnesses at trial experts retained and designated by plaintiff before plaintiff and settling PRPs agreed to dismiss claims against each other in settlement of their dispute, despite non-settling PRP's contention that it had justifiably relied on plaintiff's designation of experts, where settlement agreement prohibited plaintiff from giving non-settling PRP access to its expert reports, and non-settling PRP did not cross-designate experts prior to settlement, or provide evidence showing cost of any studies it sought to use or that such tests could not be replicated by its own experts. Fed.Rules Civ.Proc.Rule 26(b)(4)(B), 28 U.S.C.A.; Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 101 et seq., 42 U.S.C.A. § 9601 et seq.

10 Cases that cite this headnote

^[11] **Federal Civil Procedure**

🔑 Pretrial Order

Non-settling potentially responsible party (PRP) in CERCLA contribution action was not entitled to modification of scheduling order to extend time to engage experts in connection with settling PRPs' claims against it, even though settlement of claims with plaintiff precluded non-settling PRP from using testimony and reports prepared by plaintiff's experts, where non-settling PRP waited over one year after claims were asserted against it by settling PRPs to file claims against them in separate action, failed to co-designate experts with plaintiff, and chose not to participate in settlement. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 101 et seq., 42 U.S.C.A. § 9601 et seq.; Fed.Rules Civ.Proc.Rule 16(b), 28 U.S.C.A.

5 Cases that cite this headnote

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**MEMORANDUM OPINION AND ORDER RE:
BURLINGTON NORTHERN AND SANTA FE
RAILWAY COMPANY'S MOTION FOR
SUMMARY JUDGMENT (Doc.194); THE VENDO
COMPANY'S MOTION TO QUASH BURLINGTON
NORTHERN AND SANTA FE RAILWAY
COMPANY'S PROPOSED SUBPOENAS OF FMC
CORPORATION'S EXPERTS (Doc.199); BNSF'S
APPLICATION TO MODIFY THE SCHEDULING
ORDER**

WANGER, District Judge.

Before the court is third-party defendant Burlington Northern and Santa Fe Railway Company's ("BNSF") motion for ***1026** summary judgment and the Vendo Company's motion to quash BNSF's proposed subpoenas of Plaintiff FMC Corporation's experts. *See* Docs.194, 199, filed March 6, 2002. Also before the court is BNSF's application to modify the scheduling order, lodged February 12, 2002, and originally heard on shortened time on February 20, 2002. Oral argument was heard April 8, 2002.

I. BACKGROUND

BNSF contends trichloroethene ("TCE") and chromium contamination emanated from a site at 2924 South Railroad Avenue in Fresno, California (the "Vendo/Floway site," or the "Floway site"), now owned by Floway, and migrated into groundwater underlying BNSF's property at East Church Avenue and East Avenue (the "BNSF site," or the "Calwa Ice House site").¹ Plaintiff FMC Corporation ("FMC") is the owner of property at 2501 South Sunland Avenue in Fresno (the "FMC site"). The FMC site, the Floway site, and the BNSF site are clustered together along the "Railroad Avenue Corridor."

On February 23, 2000, FMC filed a Complaint against Weir Floway ("Floway") and two companies that, according to BNSF, conducted operations at the Floway site: Vendo Company ("Vendo") and Vendorlator Manufacturing Company ("VMC").² See Doc.1, Complaint. FMC filed a First Amended Complaint ("FAC") on May 19, 2000. See Doc.8. FMC alleges groundwater, which FMC is being required by state administrative agencies to remediate, is contaminated with TCE and chromium as a result of operations at the Floway site. See FAC. FMC seeks contribution under section 113(f) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9613; injunctive relief under section 7002(a)(1)(B) of the Resource Conservation and Recovery Act (the "RCRA"), 42 U.S.C. section 7002(a)(1)(B); declaratory relief under section 113(g)(2) of CERCLA, 42 U.S.C. section 9613(g)(2); contribution under the Carpenter-Presley-Tanner Hazardous Substance Account Act ("HSAA"), California Health and Safety Code § 25363; and indemnity, contribution, declaratory relief, and damages (under theories of continuing nuisance and trespass) under California state law. See *id.*

On October 11, 2000, Vendo and VMC filed a third-party complaint against BNSF. See Doc.37. On October 13, 2000, Floway filed a third-party complaint against BNSF. See Doc.38. Vendo and VMC's third-party complaint alleges chromium was and continues to be released into the soil and groundwater from the BNSF Calwa Ice House site. See Doc.37 at ¶ 26. Vendo and VMC allege BNSF and other third-party defendants released and disposed of wastes containing TCE and/or chromium at their respective sites which migrated to groundwater under the FMC site. See *id.* at ¶¶ 62-64. Vendo and VMC seek contribution under section 113(f) of CERCLA, 42

U.S.C. section 9613(f), and declaratory relief for an equitable allocation of past, present, and future response costs under section 113(g)(2) of CERCLA, 42 U.S.C. section 9613(g)(2). See Doc.37.

Floway's third-party complaint alleges TCE and chromium were used in operations *1027 at the BNSF site, that there were releases of TCE and chromium from the BNSF site into groundwater, and that BNSF is responsible for all or some of the TCE and chromium groundwater contamination at issue in FMC's claim against Weir Floway. See Doc.38. Floway seeks contribution under section 113(f) of CERCLA, 42 U.S.C. section 9613(f), declaratory relief under section 113(g)(2) of CERCLA, 42 U.S.C. section 9613(g)(2), contribution and apportionment under HSAA § 25363, and declaratory relief under state law. See *id.* BNSF answered these third-party complaints on December 1, 2000. See, Docs.79-80.

On November 13, 2001, BNSF filed a separate suit against Floway, Vendo, and VMC. See *Burlington Northern v. Vendo*, CIV F 01-6434 OWW LJO (E.D.Cal.) (the "RCRA action," or "BNSF action"), Doc.1, complaint. On December 17, 2001, BNSF filed a first amended complaint. See *Burlington*, CIV F 01-6434, Doc.14. BNSF alleges the TCE and chromium contamination in the groundwater beneath the Railroad Avenue Corridor resulted from operations at the Vendo/Floway site. See *id.* at ¶ 1. BNSF alleges the California Department of Toxic Substances and Control ("DTSC") issued an Imminent and Substantial Endangerment Order (the "ISE Order") on October 19, 1999, requiring Vendo, VMC, and Floway to investigate and remediate soil contamination on the Vendo/Floway site; to investigate the extent of the groundwater plumes emanating from the Vendo/Floway site; and to take remedial measures to clean them up. See *id.* BNSF alleges Vendo, VMC, and Floway failed to comply with the ISE Order and continued to release chromium and TCE from the Vendo/Floway site which ultimately contaminates groundwater beneath the BNSF site and beyond. See *id.*

BNSF alleges it has incurred costs and will incur additional costs relating to the TCE and chromium contamination caused by Floway, Vendo, and VMC, and that the contamination has diminished the value of its property. See *id.* BNSF asserts claims for injunctive relief under sections 7002(a)(1)(A) and (B) of the RCRA, 42 U.S.C. sections 6972(a)(1)(A) and (B); to enforce the terms of the ISE Order against Vendo, VMC, and Floway; to enjoin them from continuing to endanger health and the environment; and to order them to remediate the Vendo/Floway and BNSF sites. See *id.* at ¶¶ 24-39.

BNSF seeks damages under state law claims for nuisance and trespass. *See id.* at ¶¶ 40–53.³

On January 24, 2002, Vendo/VMC and Floway answered BNSF's FAC. *See BNSF* action, Docs.22–23. Floway asserted an affirmative defense that BNSF's claims are barred because they are compulsory counterclaims to the third-party claims against BNSF in the *FMC* action. *See BNSF* action, Doc.22 at p. 9:18–19.

On February 8, 2002, counsel for Vendo faxed a letter to BNSF informing BNSF that FMC had reached a settlement with Weir, Vendo, and VMC. *See* Doc.186 at ¶ 2, Exh. A. The letter indicated the settling “parties intend to take certain of the depositions noticed by them off calendar.” *Id.* at Exh. A. According to the letter, Vendo and Floway intend to proceed with their third-party claims and/or defenses against BNSF in this case and the related cases, *Burlington Northern v. Vendo*, CIV F 01–6434, and *Zacky Farms, v. FMC Corp., The Vendo Co., Vendorlator Mfg. Co., & Weir Floway, Inc.*, CIV F 01–5380 OWW DLB. *See id.* Vendo indicated its intent to proceed with certain depositions *1028 as currently noticed related to those claims and defenses. *See id.*

On February 11, 2002, BNSF requested that Vendo and Floway stipulate to an extension of the pretrial and trial dates in this case. *See* Doc.186 at ¶ 3, Exh. B. Later in the day, BNSF asked Vendo and Floway to stipulate to a scheduling conference on February 15, 2002. *See id.* at ¶ 4, Exh. B. Vendo and Floway declined to so stipulate. On February 12, 2002, BNSF applied to modify the scheduling order in the *FMC* case. *See* Doc.185. Vendo and Floway filed oppositions on February 19, 2002. *See* Doc.190. As amended, the scheduling order specified March 6, 2002, as the deadline for completing fact and expert discovery. *See* Doc.179, filed December 12, 2001. This date was effectively vacated pending resolution of the instant motions. Trial is currently set for May 29, 2002. *See id.*

On March 21, 2002, partial judgment pursuant to Fed.R. Civ.P. 54(b) was entered as to FMC's claims against Vendo/Floway pursuant to the terms of a confidential settlement agreement. *See* Doc.211. According to the judgment, Vendo/Floway are jointly and severally to pay \$3,750,000 to FMC within thirty days of the entry of judgment and perform work required by DTSC. *See* Doc.211. Other terms of the settlement agreement are set forth in a “Deal Point Memorandum,” submitted as part of a telephonic hearing on February 15, 2002, in which the parties formally recited their settlement for the record. *See* Doc.197, Exh. B; Doc.192. Pursuant to the terms of the Deal Point Memorandum, Vendo/Floway agrees to

investigate, remediate, and achieve hydraulic control of offsite groundwater contaminants other than nitrates, west of the eastern boundary of the BNSF railroad right-of-way and south of the northern edge of East Woodward Avenue. *See id.* FMC agrees to investigate, remediate, and achieve hydraulic control of offsite groundwater contaminants other than nitrates, east of the eastern boundary of the BNSF railroad right-of-way and south of the northern edge of East Woodward Avenue. *See id.* Vendo/Floway agree to pay two-thirds of the amount necessary to settle the *Zacky Farms* action, including a compromised amount of Zacky's net replacement water costs, and investigate and remediate the Zacky parcel. *See id.* FMC agrees to pay the remaining one-third of these costs, unless Vendo/Floway recovers from BNSF, in which case FMC's share drops to one-quarter of these costs. *See id.* FMC agrees not to assist BNSF in its prosecution or defense of the claims between BNSF and Vendo/Floway, “such as by providing BNSF with FMC's attorney work product, expert work product or by waiving any conflict between BNSF and an FMC expert.” Doc.197, Exh. D.⁴

II. LEGAL STANDARD

A. Summary Judgment

Summary judgment is warranted only “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact.” Fed.R. Civ.P. 56(c); *see California v. Campbell*, 138 F.3d 772, 780 (9th Cir.1998). The evidence must be viewed in *1029 light most favorable to the nonmoving party. *See Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir.2000) (en banc).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If the moving party fails to meet this burden, “the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102–03 (9th Cir.2000). However, if the nonmoving party has the burden of proof at trial, the moving party must only show “that there is an absence of evidence to support the nonmoving party's case.” *Celotex Corp.*, 477 U.S. at 325, 106 S.Ct. 2548.

Once the moving party has met its burden of proof, the nonmoving party must produce evidence on which a

reasonable trier of fact could find in its favor viewing the record as a whole in light of the evidentiary burden the law places on that party. *See Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir.1995). The nonmoving party cannot simply rest on its allegations without any significant probative evidence tending to support the complaint. *See Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1107 (9th Cir.2000). Instead, the nonmoving party, through affidavits or other admissible evidence, “must set forth specific facts showing that there is a genuine issue for trial.” Fed.R. Civ.P. 56(e).

[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party’s case, and on which that party will bear the burden of proof at trial. In such a situation, there can be “no genuine issue as to any material fact,” since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.

Celotex Corp., 477 U.S. at 322–23, 106 S.Ct. 2548.

Evidence submitted in support of, or in opposition to, a motion for summary judgment must be admissible under the standard articulated in 56(e). Properly authenticated documents can be used in a motion for summary judgment if appropriately authenticated by affidavit or declaration. *See Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1550–51 (9th Cir.1989). Supporting and opposing affidavits must be made on personal knowledge, set forth such facts as would be admissible in evidence, and show that the affiant is competent to testify to the matters stated therein. *See* Fed.R. Civ.P. 56(e).

“Questions of statutory construction and legislative history present legal questions which are properly resolved by summary judgment.” *T H Agric. & Nutrition Co. v. Aceto Chem. Inc.*, 884 F.Supp. 357, 359 (E.D.Cal.1995) (citations omitted).

B. Summary Adjudication

Summary adjudication may be appropriate on clearly defined, distinct issues. *See Robi v. Five Platters, Inc.*, 918 F.2d 1439 (9th Cir.1990). Fed.R. Civ.P. 56 allows a party to move for summary judgment on any part of a claim. *See* Fed.R. Civ.P. 56(a)-(d). The purpose of summary adjudication is to salvage some results from the judicial effort involved in evaluating a summary judgment

motion and to frame narrow triable issues if the court finds that the order would be helpful with the progress of litigation. *See* Fed.R. Civ.P. 56(d); *National Union Fire Ins. Co. v. L.E. Myers Co. Group*, 937 F.Supp. 276, 284 (S.D.N.Y.1996). An order under *1030 Rule 56(d) narrows the issues and enables the parties to recognize more fully their rights, yet it permits the court to retain full power to completely adjudicate all aspects of the case when the proper time arrives. *See* 10B Wright & Miller, Federal Practice and Procedure (3d ed.1998), § 2737 at 316–18. Summary adjudication may be used to dispose of affirmative defenses. *See “Z” v. Worley*, 2001 U.S. Dist. LEXIS 9476 (disposing of affirmative defense to battery claim on summary adjudication); *Sterling Bank v. Sterling Bank & Trust*, 928 F.Supp. 1014 (1996).

The procedure under Rule 56(d) is designed to be ancillary to a summary judgment motion. Unlike Rule 56(c), which allows for interlocutory judgment on a question of liability, Rule 56(d) does not authorize the entry of a judgment on part of a claim or the granting of partial relief. *See* Wright & Miller, § 2737 at 316–18. This aspect of the rule has been confused due to courts’ frequently referring to Rule 56(d) orders as “partial summary judgment” rather than summary adjudication. *See* Wright & Miller, § 2737 at 322–24. The obligation imposed on the court by Rule 56(d) to specify the uncontroverted material facts is technically compulsory. *See Woods v. Mertes*, 9 F.R.D. 318, 320 (D.Del.1949). However, if the court determines that identifying indisputable facts through partial summary adjudication would not materially expedite the adjudicative process, it may decline to do so. *See* Wright & Miller, § 2737 at 318–19.

C. Pretrial Schedule

^[1] ^[2] Rule 16(b) of the Federal Rules of Civil Procedure authorizes the district court to control and expedite pretrial discovery through a scheduling order. The standard for permitting modification of a scheduling conference order pursuant to Rule 16 is “good cause.” Fed.R. Civ.P. 16(b) (“A schedule shall not be modified except upon a showing of good cause and by leave of the district judge....”). Rule 16(b)’s “good cause” requirement, like that for Rule 56(f) relief, considers the diligence of the party seeking relief. The court may also modify the pretrial schedule “if it cannot reasonably be met despite the diligence of the party seeking the extension.” Fed.R. Civ.P. 16 advisory committee’s notes (1983 amendment); *Harrison Beverage Co. v. Dribeck Importers, Inc.*, 133 F.R.D. 463, 469 (D.N.J.1990); *Amcast Indus. Corp. v. Detrex Corp.*, 132 F.R.D. 213, 217 (N.D.Ind.1990). Carelessness is not a basis for granting

relief. *Cf. Engleson v. Burlington Northern R.R. Co.*, 972 F.2d 1038, 1043 (9th Cir.1992) (carelessness not a ground for relief under Rule 60(b)); *Martella v. Marine Cooks & Stewards Union*, 448 F.2d 729, 730 (9th Cir.1971) (same). “Although the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party’s reasons for seeking modification.” *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir.1992). If a party was not diligent, the inquiry should end. *See id.*; *Geiserman v. MacDonald*, 893 F.2d 787, 790–92 (5th Cir.1990) (upholding decision to exclude expert witnesses based on party’s failure to designate experts until two weeks after the expiration of the discovery deadline because explanations for delay were “weak, at best”). The decision to modify a scheduling order is within the broad discretion of the district court. *Johnson*, 975 F.2d at 607 (quoting *Miller v. Safeco Title Ins. Co.*, 758 F.2d 364, 369 (9th Cir.1985)); *Geiserman*, 893 F.2d at 790.

III. ANALYSIS

A. BNSF’s Motion for Summary Judgment

BNSF moves for summary judgment on the ground that Vendo/Floway as *1031 CERCLA section 113 defendants are liable only for their fair-and-several shares of liability to FMC (the PRP–Plaintiff), and as such they cannot bring third-party claims for section 113 contribution. *See* Doc.195 at p. 1:7–20. BNSF argues Floway’s state law claims for contribution, apportionment and declaratory relief must be dismissed because 1) liability under HSAA is co-extensive with liability under CERCLA, and since Floway’s CERCLA section 113 claims against BNSF are barred, its HSAA claim is barred; 2) if Floway cannot recover under CERCLA the response costs it has agreed to pay FMC, it should not be allowed to recover those same costs under an alternate state law theory. *See* Doc.195 at pp. 1–2.

1. Liability of CERCLA § 113(f) Defendants

CERCLA provides for the liability of potentially responsible parties (“PRPs”) for cleanup costs associated with contamination by hazardous substances. Title 42 U.S.C. section 9607 provides:

... Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 104(i) [42 U.S.C. § 9604(i)].

42 U.S.C. § 9607.

When remediation of a contaminated site involves multiple parties, claims for contribution may arise.

Any person may seek contribution from any other person who is liable or potentially liable under section 107(a) [42 U.S.C. § 9607(a)], during or following any civil action under section 106 [42 U.S.C. § 9606] or under section 107(a). Such claims shall be brought in

accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court ***1032** determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 106 or section 107.

42 U.S.C. § 9613(f).

Section 107(a) creates the right of contribution, the “contours and mechanics” of which are specified in section 113(f). *See The Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301–02 (9th Cir.1997) (section 107 creates the claims of contribution, i.e., liability, among PRPs and section 113 qualifies the nature of the claim, i.e., how to apportion liability among PRPs). In *Pinal Creek*, the Ninth Circuit held that “under CERCLA, a PRP does not have a claim for the recovery of the totality of its cleanup costs against other PRPs, and a PRP cannot assert a claim against other PRPs for joint and several liability.” *Pinal Creek*, 118 F.3d at 1306. Rather, “a PRP is limited to a contribution claim governed by the joint operation of §§ 107 and 113.” *Id.*

In *City of Merced v. R.A. Fields*, 997 F.Supp. 1326 (E.D.Cal.1998), the City of Merced discovered its groundwater was contaminated with tetrachloroethylene (“PCE”). *See City of Merced*, 997 F.Supp. at 1329. The City sued Merced Laundry under CERCLA and state law. *See id.* The City as a PRP could maintain a CERCLA action only for contribution under section 113. *See id.* Merced Laundry filed third-party complaints for contribution under CERCLA and state law against several parties. *See id.* The court dismissed Merced Laundry’s claims for contribution against the third parties as to amounts the City spent responding to site contamination. *See City of Merced*, 997 F.Supp. at 1332. Merced Laundry as a contribution defendant was liable for no more than its fair-and-several share of liability to the City under section 113, it could not maintain its own contribution actions against third parties. *See id.*

City of Merced illustrates its holding with examples. Example 3 provides:

To forestall a suit by the

Government, PRP X voluntarily begins cleanup of Site and incurs costs greater than X’s equitable share. X, being a PRP, brings a contribution action against Y and Z. Y and Z, being contribution defendants, are not liable to X for more than their fair-and-several share of the cleanup costs. Y and Z therefore cannot bring contribution actions against A, B, or C. However, because X is a contribution plaintiff, and not a contribution defendant, X can.

City of Merced, 997 F.Supp. at 1333. This example is overbroad. It analyzes X’s right to recover contribution against PRPs. Although Y and Z may not bring contribution actions against A, B, or C for X’s cleanup costs, Y and Z may bring third-party contribution actions against A, B, or C for Y and Z’s cleanup costs that were caused by A, B, and C. The example derives from a statement in *City of Merced* at page 1332: “Therefore, as a matter of logic, contribution defendants, as well as the parties brought in by the contribution defendants, who can by definition owe to contribution plaintiffs no more than their fair-and-several share of cleanup liability, cannot themselves maintain contribution actions of their own.” *City of Merced*, 997 F.Supp. at 1332. This “logic” ignores the PRP contribution defendant who not only is liable to a contribution plaintiff for cleanup costs incurred by that plaintiff and caused by the contribution defendant, but who also itself incurs cleanup costs as a result of contamination caused by another PRP or PRPs over and above the several share of liability owed to the original contribution plaintiff.

***1033** The overbreadth of the purported rule that “contribution defendants, as well as parties brought in by contribution defendants, cannot maintain contribution actions of their own,” is demonstrated by the result in *City of Merced*, where Merced Laundry was nonetheless permitted to sue other parties for contribution for costs in excess of Merced Laundry’s equitable share for which other PRPs were alleged to be responsible. The necessary, but unstated qualification to the “rule” of *City of Merced* is that “contribution defendants, or those joined by them, are only barred from asserting a contribution action for the costs incurred by any other PRP, when those costs are not incurred by such contribution defendant.” The statement has no application to non CERCLA based state law claims.

The implication at page 1332 of *City of Merced* that a

contribution action is maintained solely under CERCLA § 113 is squarely rejected by *Pinal Creek*, 118 F.3d at 1305 n. 7 (“We also note that the Pinal Group’s argument is based on the incorrect premise that a contribution action is not brought under § 107 As we have concluded above, a PRP’s contribution action finds implicit recognition in § 107; § 113 merely regulates its implementation.”). An interpretation barring contribution actions thwarts CERCLA’s intended equitable allocation among all responsible PRPs.

BNSF argues that FMC is in the position of “X” in Example 3; Vendo/VMC and Floway are “Y” and “Z”; and BNSF is “A” (or “B” or “C”). See Doc.195 at p. 8. FMC sues Vendo/Floway for contribution under CERCLA section 113. See FAC at ¶¶ 1, 170. FMC has not sued BNSF. BNSF argues that since Vendo/Floway are liable to FMC only for their fair-and-several portion of liability, they, as “contribution defendants” like “Y” and “Z” in Example 3, may not bring a contribution claim of their own. See Doc.195 at p. 8.

Vendo/Floway argue that because they were potentially jointly and severally liable to FMC for response costs relating to chromium and TCE contamination, they cannot be considered “contribution defendants” in the same position as “Y” and “Z”. See Doc.212 at p. 6. *Pinal Creek* notes the Seventh Circuit exception to the general rule that a PRP is limited to a contribution action for “PRPs who have not polluted the site in any way.” See *Pinal Creek*, 118 F.3d at 1303 n. 5 (citing *Rumpke of Indiana, Inc. v. Cummins Engine Co.*, 107 F.3d 1235, 1241 (7th Cir.1997) (“landowners who allege that they did not pollute the site in any way may sue for their direct response costs under § 107(a)”). The Ninth Circuit explicitly declined to address the issue of whether it recognizes such an exception. See *Pinal Creek*, 118 F.3d at 1303 n. 5.

Vendo/Floway argue FMC falls within the *Rumpke* exception with respect to TCE and chromium, see Doc.212 at p. 6, because FMC seeks § 107(a) contribution for 100% of its response costs to clean up TCE and chromium for which it claims no responsibility. See Doc.212 at p. 7:11–24. The *Rumpke* exception allows a PRP to maintain a direct cost recovery section 107(a) action only if a landowner alleges it “did not pollute the site in any way.” *Rumpke*, 107 F.3d at 1241 (emphasis added). FMC has entered into a settlement under which it agrees to share cleanup costs of contaminants (excluding nitrates), including TCE and chromium. FMC has not alleged it did not pollute the site in any way. Unlike the purported innocent landowner in *Rumpke*, the government has ordered FMC to perform remediation at the Railroad

Corridor Site, and other PRPs have brought cost recovery actions against FMC. See, e.g., *Zacky Farms, v. FMC Corp. et al.*, CIV F 01–5380 OWW DLB.

^[3] *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761 (7th Cir.1994), the case from which the *Rumpke* exception was derived, suggests that if the harm to a contaminated site is divisible, a non-innocent PRP may be able to bring a direct cost recovery claim under section 107(a) under certain circumstances. See *Akzo*, 30 F.3d at 765. Separate and distinct subterranean plumes of groundwater contamination provide a basis to divide CERCLA liability for a site. See *United States v. Broderick Investment Co.*, 862 F.Supp. 272, 277 (D.Colo.1994). Here, Vendo/Floway allege the contamination from BNSF “potentially has commingled with the plume of pesticide contamination in groundwater beneath and downgradient of the FMC site.” Doc.37 at ¶ 64; Doc.38 at ¶ 26 (“Third-Party Complainant ... alleges ... releases and disposal of wastes [by Third-Party Defendants] containing TCE and/or chromium and other hazardous substances have migrated/may continue to migrate through groundwater to locations where such substances have commingled with the plume of pesticide and other contamination in groundwater beneath and downgradient of the FMC Site”). A “single harm” may be divisible if it is possible to discern the degree to which different parties contribute to the damage. See *Broderick Investment*, 862 F.Supp. at 277. Single harms may be “treated as divisible in terms of degree,” based on the relative quantities of waste discharged. *Matter of Bell Petroleum*, 3 F.3d 889, 895–96 (5th Cir.1993); *Hercules*, 247 F.3d at 718. This sort of divisibility may be provable even where wastes have become cross-contaminated and commingled, for “comingling is not synonymous with indivisible harm.” *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 722 (2nd Cir.1993) (“*Alcan II*”); see also *Bell*, 3 F.3d at 903. Proving divisibility is a “very difficult proposition,” *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 934 n. 4 (8th Cir.1995), and the Restatement cautions against making an “arbitrary apportionment for its own sake.” Restatement (Second) of Torts § 433A cmt. to subsection (2) (1965), quoted in *Bell*, 3 F.3d at 896.; see also *United States v. Colorado & Eastern R.R. Co.*, 50 F.3d 1530, 1535 (10th Cir.1995) (noting that “the courts have been reluctant to apportion costs”).

^[4] Whether or not FMC’s TCE and chromium claims may be somehow divisible from its own responsibility for contamination of the Railroad Corridor Site, FMC’s election as a PRP to sue under CERCLA section 113 for contribution prevents FMC’s suit against Vendo/Floway from being for direct cost recovery under section 107(a). See FAC at ¶¶ 1, 170. Vendo/Floway’s contribution

action is entirely permissible under *Pinal Creek*, if the recovery sought against other PRPs is not for response costs incurred by FMC. Whether FMC could have sued for direct cost recovery under section 107(a) is not relevant. The fact FMC sues under sections 107 and 113 for contribution means that Vendo/Floway are liable only for their fair-and-several shares of site liability. Even if Vendo/Floway settled for an amount they believe is more than their fair share, FMC's action is not a direct cost-recovery action under CERCLA § 107(a) as to Vendo/Floway. *See* Doc.212 at p. 8.

Vendo/Floway correctly argue that applying the holding of *City of Merced* to this case in the manner suggested by BNSF thwarts CERCLA's underlying policy objectives. *See* Doc.212 at p. 9. Prohibiting Vendo/Floway from maintaining contribution claims for FMC's response costs discourages settlement between FMC and Vendo/Floway and derogates CERCLA's policies of encouraging settlement and promoting prompt and effective cleanup of *1035 contaminated sites. *See id.* *Pinal Creek* rejects the argument that limiting PRPs to contribution claims undermines CERCLA's policy of promoting rapid and voluntary environmental responses to hazardous waste threats. *See Pinal Creek*, 118 F.3d at 1304 ("We reject this argument because it is based on policy considerations which we cannot consider in light of controlling text, structure, and logic of CERCLA and of our own precedent in [*In re*] *Dant & Russell, Inc.*, 951 F.2d 246, 249 (9th Cir.1991)). The court noted that rapid, voluntary responses by private parties may be taken into account under section 113(f) when equitably apportioning liability and that other economic incentives exist for private parties to initiate cleanup prior to government intervention. *See Pinal Creek*, 118 F.3d at 1304-05. Allowing a PRP such as FMC to hold other PRPs jointly and severally liable for their response costs would effectively immunize the plaintiff PRP from liability for orphan shares (those shares attributable to PRPs who are either insolvent or unavailable). *See Pinal Creek*, 118 F.3d at 1303. Such a rule reduces a plaintiff PRP's incentive to sue all PRPs and "would undermine the ability of courts to allocate costs between all PRPs 'using such equitable factors as the court determines are appropriate.' " *Id.* (quoting 42 U.S.C. § 9613(f)(1)).

There is no evidence FMC has acted in collusion with BNSF to maximize Vendo/Floway's liability. To the contrary, according to the Deal Point Memorandum containing the essential terms of the settlement between FMC and Vendo/Floway, FMC agrees not to assist BNSF in its prosecution or defense of the claims between BNSF and Vendo/Floway, "such as by providing BNSF with FMC's attorney work product, expert work product or by

waiving any conflict between BNSF and an FMC expert." Doc.197, Exh. D. There is no evidence of fraud or coercion in the settlement or FMC's decision not to sue BNSF. Although FMC had an incentive to sue BNSF if BNSF contributed to the contamination FMC was remediating, as Vendo/Floway note, "FMC refused to acknowledge BNSF's [alleged] contribution to the chromium contamination." Doc.212.

Any policy considerations which favor allowing Vendo/Floway to recover in contribution against BNSF for FMC's response costs are outweighed by the objectives of avoiding multiple, unnecessary lawsuits, maintaining incentives for PRP plaintiffs to sue as many PRPs as possible (thereby avoiding substantial liability for remaining shares), and the overall concern with the speedy and effective cleanup of contaminated sites. *See THAN*, 884 F.Supp. at 361 ("All that the *Kramer* opinion actually accomplishes is another round of litigation—as defendant PRPs counterclaim against the plaintiff PRP to effectuate their recovery. Such an approach guarantees inefficiency, potential duplication, and prolongation of the litigation process in a CERCLA case.") (citing *United States v. Kramer*, 757 F.Supp. 397, 416-17 (D.N.J.1991)).

To the extent Vendo/Floway make claims for contribution for its liability to FMC for FMC's response costs, those claims are barred. Because Vendo/Floway are liable to FMC only for their fair-and-several shares of liability, they may not maintain an action under CERCLA for contribution to recover for liability they incur for FMC's response costs, even if above their fair shares. BNSF's motion for summary judgment as to Vendo/Floway's claims for contribution under CERCLA as to FMC's response costs is GRANTED.

2. Viability of Contribution Claims by § 113(f) Defendants for "First Instance" Costs

Vendo/Floway are not necessarily precluded from maintaining §§ 107 and 113 *1036 contribution claims against BNSF or other PRPs because of their status as contribution defendants, for response costs they incurred and they allege were caused by other PRPs. Despite its contrary language, *City of Merced* recognizes that contribution defendants who incur costs in response to state or federal administrative agency directives are potentially jointly and severally liable for those costs. *See City of Merced*, 997 F.Supp. at 1333. In *City of Merced*, Merced Laundry was permitted to maintain an action for costs it incurred responding to an Environmental Protection Agency directive to clean up the site, *see id.*, and a contribution action to recover such so-called "administrative response" costs. *See id.* Vendo/Floway

argue they seek and are entitled to the “first instance” costs⁵ they have incurred relating to characterizing the TCE and chromium contamination, installing and reporting results from off-property monitoring wells, investigating BNSF’s property, and evaluating the use of Zacky Farms’ property to establish hydraulic control over the contamination plume. *See* Doc.212 at p. 10. BNSF argues Vendo/Floway are precluded from recovering first instance costs because Vendo/Floway do not assert such a claim in their third-party complaints and Rule 14(a) requires dismissal of third-party claims not derivatively based on a plaintiff’s original claim. *See* Doc.217 at pp. 8–9.

a. Third-Party Complaints

In their third-party complaint against BNSF and other third-party defendants, Vendo and VMC allege in their first claim, “To the extent that Complainants are found liable in any action or administrative proceeding for any past, present or future response costs, damages, or other fees and expenses arising from the release or disposal of hazardous substances ... onto or under the Vendo/Floway Site, the FMC site, or such other location of migration of such alleged hazardous substances, then Complainants are entitled to contributions from [third-party defendants], based upon equitable factors as the court determines are appropriate pursuant to CERCLA § 113(f) (42 U.S.C. § 9613(f)).” Doc.37 at ¶ 77. Vendo and VMC seek “contribution for the equitable allocation of [third-party defendants] to any past, present, or future response costs, damages or other expenses incurred by, or assessed against, Complainants as a result of the release or disposal of hazardous substances ... onto or under the Vendo/Floway Site, the Calwa Ice House Site, the Valley Foundry Site and the CMS Site.” *See id.* at ¶ 85. In their second claim, Vendo and VMC allege third-party defendants “are liable for some or all response costs, damages or other fees and expenses incurred by Complainants, if any, and that [third-party defendants] are obligated to reimburse Complainants for such response costs, damages, or other fees and expenses.” *See id.* at ¶ 80. Vendo and VMC seek a judicial determination of the relative liability of Vendo/VMC and third-party defendants under CERCLA section 113(g)(2). *See id.* at ¶¶ 79, 83, 86. Floway’s third-party complaint’s first two claims are nearly identical. *See* Doc.38 at ¶¶ 28–39, p. 11.

*1037 ^[5] While Vendo, VMC, and Floway’s first claim against BNSF seeks reimbursement for liability it may incur for FMC’s response costs, it explicitly seeks contribution for “any past, present, or future response costs, damages or other expenses incurred by” Vendo, VMC, and Floway. *See* Doc.37 at ¶ 85; Doc.38 at p.

11:4–7. Vendo/Floway also explicitly seek in their second claim a judicial determination of the relative liability of Vendo/Floway and BNSF under CERCLA section 113(g)(2). *See* Doc.37 at ¶¶ 79, 83, 86; Doc.38 at ¶¶ 35, 36, 39, p. 11:8–12. These claims include claims for first instance costs separate and apart from FMC’s response costs. The fact that Vendo/Floway did not mention the 1999 ISE Order or the term “first instance costs” in their third-party complaint does not prevent these allegations from being sufficient to give notice that contribution is sought for such costs. *Cf.* Doc.217 at p. 7:11–16. The motion for summary judgment is denied as to first instance costs, including ISE compliance costs, caused by BNSF or other PRPs

b. Rule 14(a)

BNSF argues Vendo/Floway’s claims for first instance costs are independent and unrelated to the FMC action and settlement and must be dismissed pursuant to Fed.R. Civ.P. 14(a). Rule 14(a) provides, in relevant part:

At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff’s claim against the third-party plaintiff.

Fed.R. Civ.P. 14(a).

Vendo/Floway are entitled to bring third-party claims against BNSF if BNSF “is or may be liable to [FMC] for all or part of the [FMC’s] claim against [Vendo/Floway].” Fed.R. Civ.P. 14(a). A “third-party claim may be asserted only when the third party’s liability is in some way dependent on the outcome of the main claim and the third party’s liability is secondary or derivative.” *United States v. One 1977 Mercedes Benz*, 708 F.2d 444, 452 (9th Cir.1983) (affirming a trial court’s dismissal of defendant’s third-party complaint against federal agents for violation of defendant’s constitutional rights in a forfeiture action by the United States).

Even if BNSF may not be liable to Vendo/Floway for FMC’s claims under CERCLA section 113 relating to FMC’s response costs, BNSF can be liable to Vendo/Floway for FMC’s RCRA and state law claims for which Vendo/Floway may be held jointly and severally liable, if BNSF was the cause. *See* FAC (seeking

injunctive relief under section 7002(a)(1)(B) of the RCRA, and indemnity, contribution, declaratory relief, and damages under California law). The bar against contribution defendants' claims for contribution for a contribution complainant's response costs does not apply to FMC's non-CERCLA claims. Vendo/Floway may maintain state law claims against BNSF for contribution to recover the costs FMC seeks under state law, which were caused by BNSF. Only Floway asserts a claim under state law for contribution. *See* Doc.38. BNSF is potentially liable under Floway's state law declaratory relief contribution and indemnity claim for at least some of the costs FMC seeks against Floway, Floway's state law declaratory relief claim is properly brought under Rule 14(a). Some of Floway's state law declaratory relief claim is, at least in part, derivative of FMC's state law claims for continuing nuisance and trespass against Floway. *See* Doc.217 at p. 9:7-8. By BNSF's alleged releases from its real property which contributed to a single plume, the claims are inextricably intertwined. To its state law claim *1038 brought in compliance with Rule 14(a), Floway may join "as many claims, legal, equitable, or maritime, as the party has against" BNSF. Fed.R. Civ.P. 18(a); *see also Banks v. City of Emeryville*, 109 F.R.D. 535, 540 (N.D.Cal.1985) (third-party claim may be based on a different theory of liability than the main action).

¹⁶¹ Vendo/VMC assert only CERCLA claims. *See* Doc.37. The distinction between FMC's response costs and Vendo/Floway's first instance costs, which determines the viability of Vendo/Floway's CERCLA 113 claims, does not disqualify the claims under Rule 14(a). That Vendo/Floway's claims for first instance costs are "independent," in a CERCLA section 113 sense, from their claims related to FMC's costs, does not mean they are "independent" and therefore not derivative of FMC's claims in a Rule 14(a) sense. In *Kemper Prime Indus. Partners v. Montgomery Watson Amer., Inc.*, 2000 U.S. Dist. Lexis 11450, 2000 WL 876222 (N.D.Ill.2000), plaintiff Kemper sued Montgomery Watson Americas ("MWA"), alleging negligent misrepresentation in an environmental assessment of industrial property MWA performed for Kemper. *See Kemper*, 2000 U.S. Dist. LEXIS 11450 at *2, 2000 WL 876222 at *1. MWA impleaded third-party defendant Prime Group, alleging, *inter alia*, CERCLA claims. *See id.* at *6, 2000 WL 876222 at *2-3. In denying Prime Group's motion to dismiss on the grounds it was improperly impleaded under Rule 14(a), the court stated that "MWA set forth a number of facts in its complaint, which allege that the Prime Entities' own negligence, in not immediately cleaning up the property and in performing improper trenching operations, exacerbated the contamination at the

Site. On this basis, secondary liability could be established." *Id.* at *11-12, 2000 WL 876222 at *4. Impleader may be appropriate where a third-party defendant is potentially liable to the third-party plaintiff for damages to the extent necessary to put the third-party plaintiff in the position he would have been in absent the alleged wrongdoing by the third-party defendant. *See id.* at *11, 2000 WL 876222 at *4 (citing *Leaseway v. Carlton*, 568 F.Supp. 1041 (N.D.Ill.1983)).

"The decision to allow a third-party defendant to be impleaded under rule 14 is entrusted to the sound discretion of the trial court." *Mercedes Benz*, 708 F.2d at 452. "Rule 14(a) was designed to permit the liberal joinder of parties so that judicial energy could be conserved and consistency of results guaranteed." *New York v. Solvent Chem. Co.*, 179 F.R.D. 90, 93 (W.D.N.Y.1998) (citations omitted); *Lehman v. Revolution Portfolio L.L.C.*, 166 F.3d 389, 393 (1st Cir.1999) ("whether a third-party defendant may be impleaded under Rule 14 continues to be a question addressed to the sound discretion of the trial court") (citation omitted). Joinder under Rule 14(a) should be "freely granted to promote ... efficiency unless to do so would prejudice the plaintiff, unduly complicate the trial, or would foster an obviously unmeritorious claim." *Solvent Chem.*, 179 F.R.D. at 93 (citation omitted). Plaintiff FMC is no longer a party. It is not prejudiced by the presence of BNSF in the case. Rule 14(a) does not require dismissal of a third-party complaint where discovery is not complete. Joint-trial is favored by "the efficiency of considering all claims involving the subject site in a single lawsuit, and the moving party would not suffer any prejudice in its ability to defend against the claim in the present action that it would not also suffer as a defendant in a separate action." *Solvent Chem.*, 179 F.R.D. at 93-94. Permitting Vendo/Floway's third-party complaint to go forward will not cause undue delay since the claims between Vendo/Floway and BNSF are the only claims remaining in the action. None of the reasons why Rule 14(a) prohibits *1039 joinder of non-derivative claims is present here. Requiring a duplicitous separate lawsuit to address inextricably related claims over contiguous CERCLA sites, would unnecessarily multiply the litigation and waste judicial and party resources.

Vendo/Floway allege BNSF is a joint tortfeasor responsible for the TCE and chromium contamination which forms the basis of FMC's claims against Vendo/Floway. While FMC's failure to name BNSF as a defendant may have certain consequences under CERCLA, those consequences do not prevent Rule 14(a), impleaded of BNSF on the theory that BNSF is liable for at least some of the TCE and chromium contamination for

which Vendo/Floway have incurred costs. As a practical matter, the claims of FMC and Vendo/Floway in this action, and BNSF's claims in the related action, *Burlington Northern v. Vendo*, CIV F 01-6434 OWW LJO, are so interrelated that the interests of justice and efficiency favor consolidation of the claims into a single action. The *BNSF* case arose out of contamination and the need for CERCLA remediation of related sites in the Railroad Corridor. In a separate decision, the BNSF claims have been consolidated with the *FMC* action. BNSF's claims are compulsory counterclaims to Vendo/Floway's third-party claims asserted against BNSF in the *FMC* case. These compulsory counterclaims have been consolidated with the *FMC* action. The limitations in Rule 14(a) regarding what claims may be asserted against third-party defendants are designed to promote judicial efficiency by resolving independent disputes in a single lawsuit. The decision on Vendo/Floway's motion to dismiss, stay, or consolidate in the *BNSF* action held that "the essential facts of the various claims are so logically connected that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit." *Hydranautics*, 70 F.3d at 536 (citations omitted). These same factors prevent dismissal of Vendo/Floway's claims against BNSF based on Rule 14(a). *See* Doc.146 (order denying BNSF's severance motion on the grounds of fairness and judicial economy).

Vendo/Floway's third-party complaint for contribution from BNSF under CERCLA sections 107 and 113(f) for first instance costs, which BNSF caused to be incurred, are properly asserted. BNSF's motion for summary judgment as to Vendo/Floway's CERCLA claims for contribution for first instance response costs is DENIED.

3. Floway's HSAA Claims

BNSF argues Floway's HSAA claims are barred because liability under the HSAA is coextensive with liability under CERCLA, and BNSF cannot be liable to Floway under CERCLA. *See* Doc.195. Floway argues that, while the HSAA incorporates CERCLA's description of responsible parties and available defenses, HSAA does not incorporate the entire body of federal common law CERCLA jurisprudence including any interpretation of *City of Merced* that bars contribution defendants from asserting their own contribution claims under HSAA against other PRPs. *See* Doc.212 at p. 12:1-12.

In *THAN*, 884 F.Supp. at 363, this court stated: "Liability under CHSAA requires a finding of liability under CERCLA." *THAN*, 884 F.Supp. at 363 (citing Cal. Health & Safety Code § 25323.5(a)). Floway's HSAA contribution claim against BNSF (and FMC's HSAA

contribution claim against Vendo/Floway) is asserted under Cal. Health & Safety Code section 25363. *See* Doc.38; FAC. Section 25363 provides, in relevant part:

... any party found liable for any costs or expenditures recoverable under this chapter who establishes by a preponderance of the evidence that only a ***1040** portion of those costs or expenditures are attributable to that party's actions, shall be required to pay only for that portion.

Cal. Health & Safety Code § 25363(a).

Section 25363(e) provides, in relevant part:

Any person who has incurred removal or remedial action costs in accordance with this chapter or the federal act may seek contribution or indemnity from any person who is liable pursuant to this chapter.... An action to enforce a claim may be brought as a cross-complaint by any defendant in an action brought pursuant to Section 25360 or this section, or in a separate action after the person seeking contribution or indemnity has paid removal or remedial action costs in accordance with this chapter or the federal act.... In resolving claims for contribution or indemnity, the court may allocate costs among liable parties using those equitable factors which are appropriate.

Cal. Health & Safety Code § 25363(e).

^[7] Section 25363(e) expressly authorizes a contribution cross complaint in a pending HSAA suit, or separate lawsuit for contribution after payment of costs for removal or remedial actions under either HSAA or CERCLA. Contribution defendants may sue other PRPs, including a contribution plaintiff for first instance costs. Section 25363(a) recognizes the same principal of several liability for response costs under the HSAA; contribution defendants are not liable for more than each party's fair-and-several share of response costs, despite the exposure of a PRP to joint and several liability as a CERCLA 107 direct cost recovery defendant. However, just as Vendo/Floway's CERCLA claims for its own first

instance response costs are properly asserted under CERCLA, Floway's claim for first instance costs under HSAA may be asserted against BNSF under § 25363(e) and any other PRPs who may be liable under the HSAA. The state law follows the federal. BNSF's motion for summary judgment as to Floway's claim for contribution under HSAA as to FMC's response costs for which Floway has not expended costs is GRANTED. BNSF's motion for summary judgment as to Floway's HSAA claim for contribution for Floway's own first instance response costs is DENIED.

4. Floway's State Law Declaratory Relief Claim

BNSF argues Floway's state law claim for declaratory relief should be dismissed because 1) Floway should not be able to obtain contribution under a state law theory if such a claim is barred under a federal law CERCLA theory; and 2) the court should decline to exercise supplemental jurisdiction over remaining state law claims in the absence of any viable federal claims. *See* Doc.195 at pp. 12:10–p.15:2.

¹⁸¹ Floway correctly notes that BNSF's first argument was explicitly rejected in the decision in *City of Merced*, which held "that while liability for the CERCLA claims is several, liability of all parties to the [PRP plaintiff] under state-law theories is joint and several.... CERCLA does not preempt state-law causes of action that concern cleanup of hazardous materials." *City of Merced*, 997 F.Supp. at 1336 (citing 42 U.S.C. § 9652(d)). BNSF argues *City of Merced* does not apply on this point because here FMC, unlike the PRP City of Merced, is no longer a party due to its settlement with Vendo/Floway. *See* Doc.217 at p. 10:17–25. BNSF argues that here "Floway asks this Court to rule upon FMC's now-theoretical continuing nuisance and continuing trespass damages and then declare BNSF liable for some of those theoretical damages." *Id.* FMC's claims against Vendo *1041 /Floway for continuing nuisance and trespass are asserted in its FAC; they are not "theoretical" simply because FMC and Vendo/Floway settled. Any injury to real property of a claimant from the release and entry of contaminants past, present, and future may be addressed under these state legal theories. Any complexity that may arise in apportioning liability due to the FMC settlement agreement's lack of specificity as to how liability is apportioned under the settlement, has no effect on the basic principle that CERCLA does not preempt state law claims related to environmental cleanup.

As to BNSF's supplemental jurisdiction argument, Floway retains viable CERCLA contribution claims

relating to its first instance costs; the exercise of supplemental jurisdiction over the state law claims is required under 28 U.S.C. § 1367. BNSF's motion for summary judgment as to Floway's state law claim for declaratory relief is DENIED.

B. Vendo/Floway's Motion to Quash BNSF's Proposed Subpoenas of Plaintiff FMC's Experts

1. Vendo/Floway's Position

Vendo/Floway argue BNSF should be prohibited from deposing and calling as witnesses at trial, experts retained and designated by FMC before FMC and Vendo/Floway agreed to dismiss the claims against each other in settlement of their dispute. *See* Docs.199, 201; Doc.199, Exh. A (the "Settlement"). The Settlement provides that FMC shall not make expert work product available to BNSF, and FMC has agreed in conjunction with the Settlement to withdraw its expert designations in this case. *See* Doc.199, Exh. A at ¶ 15; Doc.199, Elliott Decl. at ¶ 3. Vendo/Floway argue BNSF chose to designate only two experts in this case even though they had ample opportunity over a nine-month period to retain and prepare whatever experts they needed. *See* Doc.219 at p. 2:1–3. Vendo/Floway maintain BNSF took a calculated risk by relying on FMC's experts' availability at trial without obtaining an agreement from FMC to cross-designate and share the cost of the experts. *See* Doc.199 at p. 2. Vendo/Floway argue BNSF cannot demonstrate the extraordinary circumstances required under Fed.R. Civ.P. 26(b)(4)(B) to justify an order allowing it to utilize FMC's experts' work in contravention of the Settlement and at the expense of delaying trial in this case. *See* Doc.199 at p. 2:24.

Vendo/Floway contend the parties entered into no written stipulation pursuant to Rule 29 regarding the taking of depositions. *See* Doc.187 at p. 5:1–9. BNSF chose not to participate in the ultimate settlement between FMC, Vendo, VMC, and Floway. Vendo/Floway speculate "BNSF expected that the settling parties' momentum and desire to resolve all claims would enable BNSF to settle at a bargain price. BNSF's 'lowball' strategy failed and did not reach a settlement." Doc.187 at p. 6:7–10. Vendo/Floway argue BNSF created the situation in which it finds itself. *See id.* at p. 6:11–18.

... BNSF has been a party in this case for fifteen months. During this time, while FMC designated eleven experts, Vendo and Floway jointly designated nine experts, and Floway designated four additional

experts, BNSF took a calculated risk and designated only two experts, perhaps hoping to ride FMC's coattails against Vendo and Floway. Having refused to settle on fair terms with the other parties, BNSF now seeks to roll back the clock and start fresh with a six to seven month delay and a new roster of experts.

Id.

Floway contends BNSF should have jointly designated experts with FMC as is customarily done in such cases. Floway's *1042 Opp. at p. 3. Floway maintains that in the absence of any agreement with FMC, BNSF has no right to "parasitically" benefit from FMC's efforts. *See id.* Floway observes BNSF has not made any affirmative claims in this litigation, so it needs only to prepare for its defense. *See id.* at p. 4. This is overly simplistic because the origin and paths of contaminant releases cannot be analyzed without expert testimony and the causes of and need for remediation consistent with the NCP must be established.

2. BNSF's Position

BNSF contends Rule 26(b)(4)(B), the "extraordinary circumstances" test, does not apply here since FMC has already designated their experts and the experts have exchanged reports and opinions. *See* Doc.204 at p. 1:13-22. BNSF argues it lies within the sound discretion of the court to permit BNSF to depose FMC's experts based on a balancing of the probative value of the testimony and the prejudice to the other party under Fed.R. Evid. 403. *See id.* According to BNSF, the probative value of the experts' testimony is high, while Vendo/Floway will suffer minimal prejudice because they have already prepared to defend against FMC's experts and they are not the party whose experts BNSF seeks to depose. *See id.* at p. 2. BNSF maintains it will be severely prejudiced if it is not allowed to use FMC's experts. *See id.* BNSF contends the Settlement itself contains no provision requiring FMC to withdraw its experts or make them unavailable for BNSF to use, so the Settlement Agreement would not be breached by allowing BNSF to depose or subpoena for trial FMC's experts. *See* Doc.204 at p. 2:3-9. BNSF argues it did not have sufficient time, given the voluminous and complex nature of the material at issue and the late date at which it entered the litigation, to designate and prepare on its own all of the experts it needs for this case. *See* Doc.204 at p. 3. BNSF maintains it justifiably relied on being able to use FMC's experts at

trial. *See id.* at p. 5. BNSF contends it had no reason to believe FMC would settle out of the case before February 8, 2002. *See id.* FMC at oral argument stated it continues to work with its experts and does not wish for them to provide work product or services for BNSF.

3. Appropriate Standard

Vendo/Floway argue Fed.R. Civ.P. 26(b)(4)(B), regarding discovery of non-testifying expert witnesses, applies to this situation. *See* Doc.199 at p. 3. Rule 26(b)(4)(B) provides that:

A party may ... discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b)⁶ or *1043 upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Fed.R. Civ.P. 26(b)(4)(B). Under the Rule 26(b)(4)(B) standard, BNSF must make a showing that "extraordinary circumstances" exist which justify its deposing FMC's experts.

BNSF argues experts whose identities and opinions have been disclosed pursuant to Rule 26(a)(2) may be deposed or subpoenaed for trial by an opposing party within the sound discretion of the court. *See* Doc.204 at p. 1. In deciding whether to allow such a deposition or subpoena, the probative value of the testimony is weighed against the prejudice to the opposing party under Fed.R. Evid. 403. *See id.* For convenience, this standard is referred to as the "balancing standard."

Fed.R. Civ.P. 26(a)(2)(A) requires a party to disclose to other parties the identity of any person who may testify as an expert witness at trial. *See* Fed.R. Civ.P. 26(a)(2)(A). Fed.R. Civ.P. 26(b)(4)(A) provides: "A party may depose any person who has been identified as an expert whose opinions may be presented at trial." Fed.R. Civ.P. 26(b)(4)(A).

BNSF argues the analysis in *House v. Combined Ins. Co. of Amer.*, 168 F.R.D. 236 (N.D.Iowa 1996), applies. *See*

Doc.204 at p. 5. *House* addressed “the vexing and surprisingly little explored question of whether one party should be able to depose or call at trial an expert designated by an opposing party who was expected to be called at trial, but whom the designating party has announced it will not call at trial.” *House*, 168 F.R.D. at 238. In *House*, plaintiff sued for employment discrimination based on quid pro quo sexual harassment, seeking, *inter alia*, damages for emotional distress. *See id.* Defendant employer designated a psychologist, Dr. Taylor, as an expert to rebut testimony of plaintiff’s expert (a social worker, not a psychologist) regarding plaintiff’s emotional suffering. *See id.* After Dr. Taylor examined plaintiff and prepared a report, plaintiff noticed Dr. Taylor’s deposition and moved to compel production of his report. *See id.* Defendant moved to quash Dr. Taylor’s deposition and for a protective order precluding any discovery from Dr. Taylor on the ground that defendant had decided not to call Dr. Taylor as a witness at trial. *See id.* Although defendant had not formally withdrawn its designation of him as an expert, Dr. Taylor was included in defendant’s witness list in the final pretrial order. *See id.* The magistrate judge assigned to the case ruled that plaintiff was entitled to Dr. Taylor’s report pursuant to Fed.R. Civ.P. 35(b) but not entitled to depose Dr. Taylor because no exceptional circumstances pursuant to Fed.R. Civ.P. 26(b)(4)(B) had been shown. *See House*, 168 F.R.D. at 238–39. Defendant filed a motion *in limine* to bar Dr. Taylor’s testimony at trial. *See House*, 168 F.R.D. at 239.

The court identified four interests weighing against allowing an opposing party to depose or call at trial a consultant, non-testifying expert witness: 1) desire to allow counsel to obtain necessary expert advice without fear that every expert consultation may yield grist for the adversary’s mill; 2) unfairness of allowing an ***1044** opposing party to reap benefits from another party’s effort and expense; 3) fear of discouraging experts from serving as consultants if their testimony could be compelled; and 4) the substantial risk of prejudice stemming from the fact of the prior retention of an expert by an opposing party. *See House*, 168 F.R.D. at 241 (citations omitted).

House analyzed the “exceptional circumstances,” “balancing,” and “entitlement” standards. Under the latter standard, a party required to submit to an expert examination should be “entitled” to the examining expert’s report and a deposition of the expert for use at trial. *See House*, 168 F.R.D. at 244. *House* distinguished between experts who will testify at trial pursuant to Fed.R. Civ.P. 26(b)(4)(A) from consultant experts who are not designated to testify at trial. *See House*, 168 F.R.D. at 245.

... Parties should be encouraged to consult experts to formulate their own cases, to discard those experts for any reason, and to place them beyond the reach of an opposing party, if they have never indicated an intention to use the expert at trial. Such a consulted-but-never-designated expert might properly be considered to fall under the work product doctrine that protects matters prepared in anticipation of litigation. For this reason also, the ability of an opposing party to call a never-designated expert at trial should depend upon a showing of “extraordinary circumstances.”

However, once an expert is designated, the expert is recognized as presenting part of the common body of discoverable, and generally admissible, information and testimony available to all parties. The practical effect of a Rule 26 designation of an expert is to make an expert available for deposition by the opposing party, and such a deposition preserves the testimony of the expert, should the expert later become unavailable, or provides a basis for impeachment, should the expert’s opinion offered at trial differ. Thus, Rule 26 designation waives the “free consultation” privilege a party enjoys as to its non-testifying experts. The court therefore concludes that designation of an expert as expected to be called at trial, pursuant to Fed.R. Civ.P. 26(b)(4)(A), even if that designation is subsequently withdrawn, takes the opposing party’s demand to depose and use the expert at trial out of the “exceptional circumstances” category of Rule 26(b)(4)(B).

House, 168 F.R.D. at 245 (citations omitted).

The court also relied on the nature and circumstances of the expert testimony sought. *See House*, 168 F.R.D. at 246 (“designation, and submission to a medical examination by the designated expert, create the kind of reliance on the availability of the expert that the court in *Rubel* found lacking where an expert had been consulted, but never designated”) (citation omitted). Although *House* noted that Rule 35 did not “entitle” a party to depose or use at trial another party’s examining expert, the expert was a psychologist who had conducted a Rule 35 mental examination of the plaintiff and was subject to the trial testimony provisions of that Rule. *See House*, 168 F.R.D. at 246 (“What, then, is the proper standard for [plaintiff] *House*’s access to and use at trial of Dr. Taylor, where both a Rule 26(b)(4)(A) designation has occurred, albeit a designation subsequently withdrawn, and a Rule 35 medical examination has occurred?”).

The court found that the circumstances warranted the application of a discretionary “balancing” standard. *See*

House, 168 F.R.D. at 246. Balancing favored deposition and use of the expert at trial based *1045 on: 1) plaintiff's interest in presenting relevant, probative information to the jury, non-cumulative of plaintiff's social worker expert who would not present psychological expert testimony; 2) the court's interest in proper resolution of the issues; and 3) plaintiff's reasonable reliance on being able to use Dr. Taylor's testimony because she was asked to consent to examination only after Dr. Taylor was designated. *See House*, 168 F.R.D. at 247. The defendant had not taken the necessary steps to prepare its expert testimony before the designation deadline. *See House*, 168 F.R.D. at 248 ("The court finds little interest in relieving a party of the consequences of an expert designation made simply to meet a court-ordered deadline, when Rule 26 provides every protection for finding and using an expert to prepare for trial prior to designation of the expert as expected to testify at trial."). The potential for prejudice to defendant from revealing to the jury Dr. Taylor was originally hired by defendant could be reduced or eliminated by excluding evidence as to how Dr. Taylor became involved in the case. *See id.* Plaintiff was allowed to depose Dr. Taylor. *See id.*; *see also Agron v. Trustees of Columbia Univ.*, 176 F.R.D. 445 (S.D.N.Y.1997) (finding Rule 26(b)(4)(B) inapplicable where plaintiff voluntarily permitted discovery of its expert's opinions and finding the balance favored allowing defendant to use plaintiff's withdrawn expert at trial).

Vendo/Floway contend *House* has no applicability to cases not involving Rule 35 personal medical or psychological examinations, involving expert reports discoverable under Rule 35(b). *See Doc.219* at p. 2. Vendo/Floway observe that the *House* reasoning was rejected in *Lehan v. Ambassador Programs, Inc.*, 190 F.R.D. 670 (E.D.Wash.2000). *See Doc.219* at p. 2. In *Lehan*, defendant informed the court it did not intend to call an expert, who had performed a Rule 35 examination and was listed on defendant's pretrial witness list. *See Lehan*, 190 F.R.D. at 671. *Lehan* denied plaintiff use of defendant's expert, explicitly rejected the balancing standard adopted in *House*, and instead applied the exceptional circumstances standard. *See Lehan*, 190 F.R.D. at 672.

In *Ross v. Burlington N.R. Co.*, 136 F.R.D. 638 (N.D.Ill.1991), plaintiff designated his expert and revealed the subject matter of the expert's testimony. After plaintiff withdrew his designation, defendant sought to depose the expert. *See Ross*, 136 F.R.D. at 638. *Ross* found that the "plaintiff has the prerogative of changing his mind" regarding the designation of experts. *See Ross*, 136 F.R.D. at 639. "Since plaintiff changed his mind

before any expert testimony was given in this case, the witness never actually acted as a testifying expert witness." *Id.* The *Ross* court was not confronted with "a situation where facts or opinions were disclosed" and applied the exceptional circumstances standard in denying defendant's request to depose plaintiff's de-designated expert. *Id.* (citing *Durflinger v. Artiles*, 727 F.2d 888, 891 (10th Cir.1984) (affirming trial court's exclusion of testimony of expert originally designated and subsequently withdrawn by plaintiff because defendants failed to show exceptional circumstances)).

In *Dayton-Phoenix Group, Inc. v. Gen. Motors Corp.*, 1997 WL 1764760 (S.D.Ohio 1997), defendant designated an expert to testify about equipment and machinery. After defendant decided not to call the expert as a witness, plaintiff sought to subpoena him. *See Dayton-Phoenix*, 1997 WL 1764760 at *1. *Dayton-Phoenix* considered the differing results in *House* and *Ross* and adopted *Ross*'s exceptional circumstances approach. *See id.* The court reasoned: 1) the Advisory Committee Notes to Rule 26(b)(4)(B) limit discovery to "trial witnesses," the expert would not be a trial witness; 2) the primary purpose of Rule 26(b)(4)(B) is to allow a party to *1046 prepare adequately for cross-examination at trial, a purpose not applicable where the witness would not actually be called at trial; and 3) Rule 26(b)(4)(B)'s purpose of promoting fairness by preventing access to another party's diligent trial preparation is furthered by denying such access. *See id.*

In *Wolt v. Sherwood*, 828 F.Supp. 1562, 1568 (D.Utah 1993), the court held that Rule 26(b)(4)(B) "is designed to promote fairness by precluding unreasonable access to an opposing party's diligent trial preparation." The court in *Wolt* applied the exceptional circumstances standard in holding that non-settling defendants could not use experts retained by a settling defendant where the settlement agreement prevented such use. *See Wolt*, 828 F.Supp. at 1567-68 ("Nonsettling parties are not prejudiced because the 'expertise' will be made available, in spite of a settlement, if the nonsettling parties can show 'exceptional circumstances' under Fed.R. Civ.P. 26(b)(4)(B)."). The court noted that "exceptional circumstances might exist where the settling party's expert has unique expertise which may not be readily available to other non-settling parties, or where the settling party's expert participated in tests which cannot be replicated by new experts." *Wolt*, 828 F.Supp. at 1568 n. 18.

Unlike *House*, the experts here have not performed a personal medical examination pursuant to Rule 35, nor scientific tests that are unavailable or unduplicatable.

FMC and Vendo/Floway have agreed not to permit BNSF to use FMC's experts. The totality of the circumstances justifies application of the "exceptional circumstances" standard to Vendo/Floway's motion to quash.

4. Applying the Exceptional Circumstances Standard

As in *Wolt*, there is no showing that FMC's experts have unique expertise, otherwise unavailable to BNSF, or that they "participated in tests which cannot be replicated by new experts." *Wolt*, 828 F.Supp. at 1568 n. 18. In *In re Shell Oil Refinery*, 132 F.R.D. 437 (E.D.La.1990), Shell submitted expert reports in compliance with a court-ordered deadline for experts testifying at trial. See *Shell*, 132 F.R.D. at 439. Shell's later decision not to call some of the authors of the reports as experts at trial was "permissible" and transformed those witnesses into "non-testifying experts," within the meaning of Rule 26(b)(4)(B), whose testimony could be used by another party only upon a showing of "exceptional circumstances." See *Shell*, 132 F.R.D. at 440-42. A showing that over \$300,000 was required to replicate those tests was insufficient to demonstrate "exceptional circumstances" where "plaintiffs can obtain the substantial equivalent by having their own experts conduct tests." *Shell*, 132 F.R.D. at 443. BNSF provides no evidence showing the cost of any studies it seeks to use or that such tests cannot be replicated by its own experts.

¹⁹¹ Under Rule 26(b)(4)(B), a party "carries a heavy burden in demonstrating the existence of exceptional circumstances." *Spearman Indus. v. St. Paul Fire & Marine Ins. Co.*, 128 F.Supp.2d 1148, 1151 (N.D.Ill.2001) (citation omitted). Exceptional circumstances may exist where 1) the object or condition at issue is destroyed or has deteriorated after the non-testifying expert observes it but before the moving party's expert has an opportunity to observe it; or 2) there are no other available experts in the same field or subject area. See *Spearman*, 128 F.Supp.2d at 1152. BNSF makes no showing the plume of contamination has deteriorated or is inaccessible to further study by other available experts in the field.

*1047 ¹¹⁰¹ BNSF does not show exceptional circumstances exist to warrant an order allowing it use FMC's experts.

5. Applying the Balancing Standard

Assuming, *arguendo*, the balancing standard applies to this case, BNSF's showing is still inadequate to permit it access to FMC's experts.

"The claimed importance of expert testimony underscores the need for [BNSF] to have timely designated [its] expert witness so that [opposing counsel] could prepare for trial. The importance of such proposed testimony cannot singularly override the enforcement of local rules and scheduling orders." *Geiserman*, 893 F.2d at 792 (footnote omitted). BNSF created the situation in which it finds itself by not cross-designating FMC's experts to give notice it intended to rely on FMC's witnesses without a formal agreement as to their shared use. See *State ex rel. Ward v. Hill*, 200 W.Va. 270, 278, 489 S.E.2d 24 (1997) (holding "that, absent a formal agreement among defendants in a litigation proceeding involving multiple defendants, the circuit court should not generally permit a settling defendant's expert witnesses to testify for the remaining defendants," especially where doing so would violate the settlement agreement). BNSF has not been diligent so as to entitle it to use FMC's experts under Fed.R. Civ.P. 26(b)(4)(B)'s extraordinary circumstances standard. To the contrary, BNSF shows an unjustifiable lack of diligence. BNSF's counsel are experienced and competent in the field of environmental law. It is indisputable that CERCLA litigation inevitably results in a "battle of the experts." It is inconceivable that BNSF's counsel could not have known of the need for experts to defeat the opposing parties' claims.

Rewarding BNSF by allowing it to use FMC's experts under these circumstances has the potential to discourage settlement in contravention of public policy favoring settlement and to upset the expectations of parties, the court, and the policy of the law that encourages diligence and discourages profit from the work product and industry of the opponent. See *Wolt*, 828 F.Supp. at 1568. BNSF observes that the Settlement does not contain an explicit prohibition against BNSF's using FMC's experts without assistance from FMC. However, FMC has made an agreement apart from the settlement that it will withdraw its experts. FMC has further work for its experts and does not want them used by BNSF. The fact that FMC's agreement is not part of the Settlement Agreement does not make it less enforceable or less important.

BNSF's argument that it had inadequate time to prepare and designate other experts rings hollow in light of the fifteen months time it has had to prepare since it was joined in the FMC case. BNSF had over nine months after it was brought into this case to designate and prepare experts. BNSF had previously engaged outside experts to conduct a limited investigation into the site in 1995-96. It was well aware of the issues when it was named as a third-party defendant, allegedly responsible for contributing to remediation costs at the FMC site.

BNSF argues it justifiably relied upon being able to use FMC's experts at trial because it had no indication that FMC would settle and be dismissed from the case. Yet, BNSF was aware of and participated in the extensive efforts to mediate the case. To the extent these efforts took place after the expert designation deadline, BNSF could have sought an agreement with FMC to share FMC's experts, but did not. Even before the expert designation deadline, BNSF could have sought such an agreement and should have known, especially as an experienced party in environmental ***1048** cleanup litigation,⁷ that settlement was a likely possibility which would leave it with only two designated experts.

BNSF has made no showing that the information and opinions of FMC's experts are unobtainable from other experts in the field or that their studies are incapable of being reproduced. There is a strong policy against permitting a non-diligent party from free-riding off the opponent's industry and diligence. *See Ager v. Jane C. Stormont Hospital*, 622 F.2d 496, 502 (10th Cir.1980) (noting that "the structure of rule 26 was largely developed around the doctrine of unfairness designed to prevent a party from building his own case by means of his opponent's financial resources, superior diligence and more aggressive preparation"); *Shell*, 132 F.R.D. at 443 (applying Rule 26(b)(4)(B)'s "intended purposes of protecting trial strategy and preventing one party from having a free ride at the expense of the other party"); *Wolt*, 828 F.Supp. at 1568 ("The rule is designed to promote fairness by precluding unreasonable access to an opposing party's diligent trial preparation.").

Now that a new schedule is being implemented in this case, due to the effective consolidation of this case with the *BNSF* action, BNSF will have additional time to retain, designate, and prepare experts regarding its claims against Vendo/Floway. This additional time effectively eliminates prejudice to BNSF caused by the unavailability of FMC's experts. Even under the balancing standard, BNSF's lack of diligence and the prejudice to FMC outweighs the probative value of the testimony of FMC's experts.

Vendo's motion to quash BNSF's proposed subpoenas of Plaintiff FMC's experts is GRANTED.

C. BNSF's Application to Modify the Scheduling Order

BNSF requests modification of the scheduling order because Vendo and Floway's "unilateral cancellation" of as many as 24 depositions leaves insufficient time to re-notice and take all of the previously scheduled

depositions by the discovery cut-off date. *See* Doc.185, Application, p. 2:1-9. BNSF contends it will suffer extreme prejudice unless it is permitted to engage its own experts in areas previously covered by FMC's experts. *See id.* BNSF contends Vendo and Floway have rejected BNSF's proposal to consolidate BNSF's RCRA action with this case and extend the pretrial and trial schedule by approximately six months despite a pending motion to dismiss, stay or consolidate in the RCRA action by Vendo and Floway.⁸ *See id.* at ***1049** p. 2:10-15.

Vendo, VMC, and Floway (together, "Vendo/Floway") oppose BNSF's application and its characterization of the events surrounding the settlement. *See* Doc.187, Vendo's Opp., filed February 13, 2002; Floway's Opp. Vendo/Floway contend they did not "unilaterally" take depositions off calendar and that no additional time is necessary to complete the depositions. *See* Doc.187 at p. 2:2-7. The February 8, 2002, letter informing BNSF of the settlement observed that BNSF had noticed no depositions and requested that BNSF inform Vendo/Floway of the identities of any percipient and expert witnesses BNSF intends to depose. *See* Doc.186 at Exh. A. Vendo/Floway kept on calendar the depositions of BNSF's experts and percipient witnesses. *See* Doc.187 at p. 2:16-19. Vendo/Floway contend other depositions were taken off calendar "to save litigation costs and because it appeared that BNSF would cho[ose] to take only some of the depositions noticed by others and was not prepared to proceed under the existing schedule." *See id.* at p. 3:1-4.

Vendo contends that during a telephone call with counsel for Vendo on February 8, 2002, counsel for BNSF, Deborah Miller, did not object to taking the depositions off calendar. *See id.* at p. 3:10-18. Vendo maintains BNSF changed its position on February 11, 2002, requesting Vendo/Floway to stipulate to the consolidation of Vendo/Floway's third-party claims against BNSF in the *FMC* action with Vendo/Floway's related counterclaims and defenses against BNSF in the RCRA action. *See id.* at p. 3:22-27. According to Vendo, BNSF requested the consolidated action be set for trial in November or December 2002. *See id.* at pp. 3-4. Vendo/Floway declined to so stipulate, responding that they wished to proceed with their motion to dismiss in the *BNSF* action on the grounds that BNSF's claims should have been made as compulsory counterclaims in the original *FMC* action and were not timely filed. *See id.* at p. 4:1-6.

BNSF's application suggests it has designated experts for its defense, but seeks more time to designate experts for its claims against Vendo/Floway. *See* Application at p.

4:3–5 (“... BNSF did not engage experts relating to Vendo/Floway’s liability, but instead engaged experts to testify specifically about the BNSF site, the location of a former ice house.”).

^[11] Vendo and VMC filed their third-party complaint against BNSF on October 11, 2000. *See* Doc.37. Floway filed its third-party complaint against BNSF on October 13, 2000. *See* Doc.38. As a third-party defendant, BNSF was required to “make ... any counterclaims against the third-party plaintiff [s] ... as provided in Rule 13.” Fed.R. Civ.P. 14(a). BNSF filed no counterclaims. Instead, BNSF filed answers to both Vendo/VMC’s third-party complaint and Floway’s third-party complaint on December 1, 2000. *See* Docs.79–80. It then waited over a year after the third-party complaints were filed to file claims in a new and separate action against Weir Floway, Vendo, and VMC. *See Burlington Northern v. Vendo*, CIV F 01–6434 OWW LJO, Doc.1, filed November 13, 2001. BNSF failed to co-designate experts with FMC. BNSF chose not to participate in the settlement which it claims resulted in the need to modify the scheduling order. Diligence, not carelessness, is the basis for granting relief under Rule 16(b). BNSF was not diligent.

BNSF’s contention that it will be prejudiced focuses on the experts necessary to ***1050** prove Vendo/Floway’s liability, an issue that is now relevant to this action, which as consolidated includes compulsory claims against Vendo/Floway. The issue of modifying the case schedule now involves more than BNSF’s diligence in complying with the scheduling order in this case. However, in determining that the claims in the *BNSF* should have been alleged as compulsory counterclaims in the *FMC* action, it is true BNSF bears some responsibility for failing to timely allege its claims.

“[D]elays are a particularly abhorrent feature of today’s trial practice. They increase the cost of litigation, to the detriment of the parties enmeshed in it; they are one factor causing disrespect for lawyers and the judicial process; and they fuel the increasing resort to means of non-judicial dispute resolution. Adherence to reasonable deadlines is critical to restoring integrity in court proceedings.” *Geiserman*, 893 F.2d at 792. Although BNSF fails to demonstrate good cause for modifying the scheduling order in this case on the sole ground that it needs more time to depose and prepare experts, which it should have engaged and designated for its defense against Vendo/Floway’s claims, in light of the consolidation of the *BNSF* action with the *FMC* action, some modification of the schedule is required. BNSF’s offer to consolidate the *BNSF* and *FMC* actions for trial in November or December of 2002 was rejected by

Vendo/Floway. *See* Doc.187 at pp. 3–4. Vendo/Floway bear some responsibility for the scheduling dispute. All parties were advised by the court at an earlier scheduling conference that the addition of PRPs would affect the case schedule. There is no reason BNSF cannot try its compulsory counterclaims in the *FMC* action with a minimum of delay. The contaminants, site, and parties are the same. The effective consolidation of the cases was precipitated by Vendo/Floway’s motion to dismiss, stay, or consolidate in the *BNSF* action. They must reasonably expect the outcome they requested in that action, dismissal with leave to file compulsory counterclaims in the *FMC* action, to have some effect on the deadlines in this case. Vendo/Floway do not demonstrate how a delay of a few months will prejudice them, while BNSF will be greatly prejudiced if it is not allowed reasonable time to prepare its case against Vendo/Floway.

Under the current schedule, the trial date is May 29, 2002. Pursuant to the schedule announced and accepted by the parties in open court on April 8, 2002, the new trial date is October 29, 2002. The last day to file dispositive motions is August 15, 2002, with a hearing date of September 16, 2002. The expert and overall discovery cut-off date is July 31, 2002. The last day to designate experts is May 20, 2002. The parties shall submit a joint amended schedule consistent with this decision and conforming to the requirements outlined by the court at oral argument and with the Local Rules.

IV. CONCLUSION

1. BNSF’s motion for summary judgment as to Vendo/Floway’s CERCLA claims for contribution as to FMC’s response costs is GRANTED.
2. BNSF’s motion for summary judgment as to Vendo/Floway’s CERCLA claims for contribution for their own first instance response costs is DENIED.
3. BNSF’s motion for summary judgment as to Floway’s claim for contribution under HSAA as to FMC’s response costs is GRANTED.
4. BNSF’s motion for summary judgment as to Floway’s HSAA claim for contribution for its own first instance response costs is DENIED.
5. BNSF’s motion for summary judgment as to Floway’s state law claim for declaratory relief is DENIED.

*1051 6. Vendo's motion to quash BNSF's proposed subpoenas of Plaintiff FMC's experts is GRANTED.

7. BNSF's application to modify the scheduling order on the ground that it needs more time to depose and prepare experts for its defense against Vendo/Floway's claims is DENIED.

8. In light of the consolidation of the *BNSF* action into the *FMC* action, some modification to the schedule is required. Pursuant to the schedule announced and accepted by both parties in open court, the new trial date is October 29, 2002. The last day to file dispositive motions is August 15, 2002, with a hearing date September 16, 2002. The expert

and overall discovery cut-off date is July 31, 2002. The last day to designate experts is May 20, 2002. The parties shall submit a joint amended schedule consistent with this decision and conforming to the requirements outlined by the court at oral argument and with the Local Rules.

SO ORDERED.

Parallel Citations

54 ERC 1711, 32 Env'tl. L. Rep. 20,642

Footnotes

- 1 In Vendo and VMC's third-party complaint, the BNSF site is alleged to be "located adjacent to East Church Avenue between South Railroad Avenue and Sunland Street in Fresno, California at 2950 East Church Avenue, Fresno, California." Doc.37 at ¶ 16.
- 2 Vendo, VMC, and Floway collectively are referred to variously as "Defendants," "Third-Party Plaintiffs," "Third-Party Complainants," and "Vendo/Floway."
- 3 The paragraphs under BNSF's fifth claim for relief are incorrectly numbered and should be numbered 49-53. *See Burlington*, CIV F 01-6434, Doc.14.
- 4 The Settlement Agreement provides:
FMC agrees not to aid the prosecution of any pending claim against Defendants by BNSF, or the defense of any pending claim filed by Defendants against BNSF, whether asserted in the FMC Action, Zacky Action, BNSF Action or a potential DTSC action, or in future claims which may be asserted by or against BNSF arising out of the matters which are the subject of this Settlement Agreement, such as by providing attorney work product, expert work product or by waiving conflicts between a litigant and FMC experts, except to the extent required by legal process or order of the Court....
Doc.199, Exh. A at ¶ 15.
- 5 The decision in *Pinal Creek* defines "first instance costs" as costs incurred by a "working PRP," a PRP that actually conducts cleanup operations, as opposed to one that reimburses a third party for the cost of the latter's cleanup efforts. *See Pinal Creek*, 118 F.3d at 1304 n. 6. The decision in *City of Merced* defines "administrative response costs" as costs incurred by a party ordered to respond to a hazardous waste site by a state or federal administrative agency. *See City of Merced*, 997 F.Supp. at 1333. First instance costs include administrative response costs and other costs of cleanup operations directly incurred.
- 6 Fed.R. Civ.P. 35(b) governs expert reports of physical and mental examinations of parties or persons under the legal control of a party.
(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of the detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the court may exclude the examiner's testimony if offered at trial.
....
(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other rule.
Fed.R. Civ.P. 35(b).
- 7 "[I]t is obvious to any sophisticated trial lawyer that in litigation involving multiple defendants there is a likelihood that settlement will occur before trial. To rely on another party defendant's witnesses without some formal agreement as to the shared use is to

invite the consequences that arose ... in the present case.” *Wolt*, 828 F.Supp. at 1567 (citation omitted).

- 8 In the *BNSF* action, Vendo and VMC join Floway’s motion to dismiss or stay, or in the alternative, to consolidate with *FMC v. Vendo*, CIV F 00–5295 OWW LJO. See *Burlington Northern v. Vendo*, CIV F 01–6434 OWW LJO, Doc.21, filed January 24, 2002 (motion); Doc.25, filed February 5, 2002 (joinder). The moving parties contend the underlying facts in BNSF’s claims against them in the *BNSF* action are identical to Floway’s third-party claims against BNSF in the *FMC* action. See *id.* at p. 1:24–28. Floway argues BNSF’s claims should have been presented as compulsory counterclaims against Floway in the *FMC* action and that BNSF’s separate RCRA action should be dismissed or stayed, or at least consolidated. See *id.* at p. 1:28–p.2:4. Floway asserts it “will stipulate that BNSF can file its claims as counterclaims in the *FMC* action.” *Id.* at p. 5 n. 1. Oral argument on the motion was heard March 4, 2002. See Doc.24, filed February 1, 2002; Doc.30. The parties were afforded an opportunity to file supplemental papers. A further hearing on the motion was held April 8, 2002, at the same time as the motions in the *FMC* action at issue here. A decision under separate cover grants the motion to consolidate for BNSF to assert its claims as compulsory counterclaims in the *FMC* action. See *BNSF* action, Doc.35.

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Johnny L. BRADLEY, et al.
v.
COOPER TIRE & RUBBER COMPANY, and Ford
Motor Company.

No. 07-mc-001-JM. | Jan. 11, 2007.

Attorneys and Law Firms

Johnny L. Bradley, pro se.

James C. Wheat, Wadleigh Starr & Peters, Manchester,
NH, for Cooper Tire & Rubber Company.

ORDER

JAMES R. MUIRHEAD, United States Magistrate Judge.

***1** Defendant Cooper Tire & Rubber Company (“Cooper Tire”) moves to quash plaintiffs’ subpoenas directed to Dr. Christopher G. Shapley who, from August 15, 2006 until December 15, 2006, was a designated expert of Cooper Tire.

Background

Dr. Shapley was designated by Cooper Tire on August 15th. Prior to that he had been deposed as a fact expert in connection with a claim of spoliation of the tire in question in the accident. He stated that he never saw the tire. Also on August 15th a copy of his report was produced. On August 16th he was offered up for a deposition on September 29th. Plaintiffs accepted the offer and noticed Shapley’s deposition for September 29. By letter of September 22, 2006 Attorney Richard H. Monk III of Bradley Arant Rose & White LLP, counsel to Cooper Tire, reneged on his agreement to have Shapley deposed on the 29th. In fact, neither Bradley Arant lawyers nor Shapley appeared on September 29, 2006.

Plaintiffs’ counsel alleges that Monk, to avoid a sanctions hearing, then proposed dates in early December. Still later he withdrew the proffered December dates and, by letter of November 17, 2006, offered a Shapley deposition on January 5, 9, or 12, 2007. On November 29th plaintiffs’ counsel issued deposition notices for January 12th. On December 15th Cooper Tire filed an amended expert designation omitting Dr. Shapley as a testifying expert. Cooper Tire, presumably through its counsel, informed plaintiffs that Dr. Shapley would not be produced because he was now a “consulting expert”. Plaintiffs then subpoenaed Dr. Shapley for deposition on the 12th. Cooper Tire, joined by Ford, move to quash the subpoena. Plaintiffs’ counsel says he cross-designated Shapley but no such designation appears on the designation of experts he attached as an exhibit to his objection.

Discussion¹

Federal Rules of Civil Procedure 26(b)(4)(H) permits a party to depose “any person who has been identified as an expert whose opinions may be presented at trial.” On the other hand, a deposition of consulting expert is permitted “only as provided in Rule 35(b) or upon a showing of exceptional circumstances.” Fed.R.Civ.P. 26(b)(4)(B). The purpose of Rule 26(b)(4)(A) is to permit for preparation for cross-examination at trial. *Shu-Tao Lin v. McDonnell Douglas Corp.*, 742 F.2d 45, 48 n. 3 (2d Cir.1984). The purpose of Rule 26(b)(4)(B) is to preclude “unreasonable access to an opposing party’s diligent trial preparation.” *Durflinger v. Artiles*, 727 F.2d 888, 891 (10th Cir.1984). In other words, Rule 26(b)(4)(B) is intended to protect the attorney’s work product.

The principal question is whether Rule 26(b)(4)(A) or (B) applies. On this question there is a split authority. A leading treatise states:

Once a party has designated an expert witness as someone who will testify at trial, the later withdrawal of that designation may neither prevent the deposition of that witness by the opposing party nor the expert’s testimony at trial. Furthermore, if a party is deemed to have waived the privilege as to documents provided to its named expert, that party may not avoid production of those documents under Rule 26(b)(4)(A) by later

changing the designation of that expert from “testifying” to “non-testifying” expert.

*2 6 *Moore’s Federal Practice* § 26.80[1][a](3d ed.) Professor Moore cites to *House v. Combined Ins. Co. of America*, 168 F.R.D. 238 (N.D.Iowa 1996) and *CP Kelco U.S. Inc. v. Pharmacia Corp.*, 213 F.R.D. 176 (D.Del.2003). Other cases also support this view. See *Ferguson v. Michael Foods, Inc.*, 189 F.R.D. 408 (D.Minn.1999); *Rubel v. Eli Lilly and Co.*, 160 F.R.D. 458, 460 (S.D.N.Y.1995).

The contrary line of authority provides that a party may prohibit discovery from a consulting witness after his designation as an expert is withdrawn. See *Callaway Golf Co. v. Dunlop Slazenger Group Americas*, 2002 WL 1906628 (D.Del. Aug. 14, 2002) (collecting case law); *FMC Corp. v. Vendo Co.*, 196 F.Supp.2d 1023, 1041–047 (E.D.Cal.2002); *Ross v. Burlington Northern R. Co.*, 136 F.R.D. 638, 638–39 (N.D.Ill.1991); *Netjumper Software, L.L.C. v. Google, Inc.*, 2005 WL 3046271 (S.D.N.Y. Nov. 10, 2005).

Understanding that I do not have time to write an extensive opinion before counsel must board planes for New Hampshire, I will nevertheless briefly set forth the

Footnotes

- ¹ While Bradley Arant appears to have breached two “attorneys agreements” such agreements are enforceable under New Hampshire law only as to attorneys practicing here. As a consequence, this motion cannot be decided on the basis of the enforcement of attorneys’ agreements.
- ² Nothing in this order is intended to indicate any view of the admissibility of Dr. Shapley’s testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1998) and its progeny.

rationale for my decision to deny the motion to quash.

To suggest that Cooper Tire is or needs to consult with Mr. Shapley confidentially at this time is a charade. Shapley’s written opinion has been produced. He has been deposed as a fact witness and has given a statement. His opinion is offensive not defensive vis-a-vis Cooper Tire; that is, he has opined that the Ford Ranger is defective. He has no opinion on the tire. Cooper Tire is not prejudiced in any way. Furthermore, the change in designation at the last minute comes after two cancellations by Cooper Tire of agreed upon depositions. Under the facts of this case I find the *House* analysis persuasive. Fairness requires the deposition go forward and there is no prejudice. Ford’s motion for joinder (document no. 2) is granted.

Cooper Tire’s motion to reply (document no. 6) is granted.

The Motion to Quash (document no. 1) is denied.²

SO ORDERED.

118 S.Ct. 657
Supreme Court of the United States

Kenneth Lee BAKER and Steven Robert Baker, by
his next friend, Melissa THOMAS, Petitioners,
v.
GENERAL MOTORS CORPORATION.

No. 96–653. | Argued Oct. 15, 1997. | Decided Jan.
13, 1998.

Administrator of estate of motorist, who was killed after vehicle in which she was riding was involved in head-on accident and fire, brought products liability action against vehicle manufacturer, alleging that fuel pump was defective. After manufacturer failed to comply with court's order to produce records of customer complaints of similar accidents, sanction was imposed by the United States District Court for the Western District of Missouri, Joseph E. Stephens, Jr., Chief Judge, 159 F.R.D. 519, under which manufacturer's affirmative defenses were stricken and it was established, for purposes of action, that automobile had defective fuel pump and that pump continued to operate after engine stopped. Following trial, judgment was entered by the District Court on jury verdict, awarding administrator \$11.3 million in damages. Manufacturer appealed. The United States Court of Appeals for the Eighth Circuit, 86 F.3d 811, reversed and remanded. Writ of certiorari was granted. The Supreme Court, Justice Ginsburg, held that injunction barring former employee from testifying as witness against car manufacturer, which was entered by Michigan county court pursuant to parties' stipulation in employee's wrongful discharge action against manufacturer, did not reach beyond controversy between employee and manufacturer to control proceedings elsewhere, and thus, employee could testify in Missouri products liability action brought against manufacturer without offense to full faith and credit clause.

Reversed and remanded.

Justice Scalia filed concurring opinion.

Justice Kennedy concurred and filed opinion in which Justices O'Connor and Thomas joined.

West Headnotes (8)

[1] **States**

Full faith and credit in each state to the public acts, records, etc. of other states

Full faith and credit clause does not compel state to substitute statutes of other states for its own statutes dealing with subject matter concerning which it is competent to legislate. U.S.C.A. Const. Art. 4, § 1; 28 U.S.C.A. § 1738.

23 Cases that cite this headnote

[2] **Judgment**

Adjudications operative in other states

Final judgment in one state, if rendered by court with adjudicatory authority over subject matter and persons governed by judgment, qualifies for recognition throughout the land; in other words, for claim and issue preclusion (res judicata) purposes, judgment of rendering state gains nationwide force. U.S.C.A. Const. Art. 4, § 1; 28 U.S.C.A. § 1738.

98 Cases that cite this headnote

[3] **Judgment**

Adjudications operative in other states

States

Full faith and credit in each state to the public acts, records, etc. of other states

Court may be guided by forum state's public policy in determining law applicable to controversy; however, there is no roving public policy exception to full faith and credit due judgments. U.S.C.A. Const. Art. 4, § 1; 28 U.S.C.A. § 1738.

51 Cases that cite this headnote

[4]

Judgment

⚙️ Adjudications operative in other states

Full faith and credit clause is one of provisions incorporated into Constitution by its framers for purpose of transforming aggregation of independent, sovereign states into nation; however, there are no considerations of local policy or law which could rightly be deemed to impair force and effect which full faith and credit clause and Act of Congress require to be given to money judgment outside state of its rendition. U.S.C.A. Const. Art. 4, § 1; 28 U.S.C.A. § 1738.

66 Cases that cite this headnote

[5]

Judgment

⚙️ Nature and Extent of Relief Sought or Granted

There is no reason why preclusive effects of adjudication on parties and those in privity with them, i.e., claim preclusion and issue preclusion (res judicata and collateral estoppel), should differ depending solely upon type of relief sought in civil action, whether relief is monetary or equitable.

44 Cases that cite this headnote

[6]

Judgment

⚙️ Adjudications operative in other states

Judgment

⚙️ Enforcement in other states

Full faith and credit does not mean that states must adopt practices of other states regarding time, manner, and mechanisms for enforcing judgments; enforcement measures do not travel with sister state judgment as preclusive effects do, but, rather, such measures remain subject to even-handed control of forum law. U.S.C.A. Const. Art. 4, § 1; 28 U.S.C.A. § 1738.

46 Cases that cite this headnote

[7]

Injunction

⚙️ Mode and Extent of Punishment

Sanctions for violations of injunction are generally administered by court that issued injunction.

24 Cases that cite this headnote

[8]

Judgment

⚙️ Full Faith and Credit

Injunction barring former employee from testifying as witness against car manufacturer, which was entered by Michigan county court pursuant to parties' stipulation in employee's wrongful discharge action against manufacturer, did not reach beyond controversy between employee and manufacturer to control proceedings elsewhere, and thus, employee could testify in Missouri products liability action brought against manufacturer in federal court without offense to full faith and credit clause. U.S.C.A. Const. Art. 4, § 1; 28 U.S.C.A. § 1738.

48 Cases that cite this headnote

****658 Syllabus***

***222** For 15 of the years Ronald Elwell worked for respondent General Motors Corporation (GM), he was assigned to a group that studied the performance of GM vehicles. Elwell's studies and research concentrated on vehicular fires, and he frequently aided GM lawyers defending against product liability actions. The Elwell-GM employment relationship soured in 1987, and Elwell agreed to retire after serving as a consultant for two years. Disagreement surfaced again when Elwell's retirement time neared and continued into 1991. That year, plaintiffs in a Georgia product liability action deposed Elwell. The Georgia case involved a GM pickup truck fuel tank that burst into flames just after a collision. Over GM's objection, Elwell testified that the truck's fuel system was inferior to competing products. This

testimony differed markedly from testimony Elwell had given as GM's in-house expert witness. A month later, Elwell sued GM in a Michigan County Court, alleging wrongful discharge and other tort and contract claims. GM counterclaimed, contending that Elwell had breached his fiduciary duty to GM. In settlement, GM paid Elwell an undisclosed sum of money, and the parties stipulated to the entry of a permanent injunction barring Elwell from testifying as a witness in any litigation involving GM without GM's consent, but providing that the injunction "shall not operate to *interfere with the jurisdiction of the Court in ... Georgia* [where the litigation involving the fuel tank was still pending]." (Emphasis added.) In addition, the parties entered into a separate settlement agreement, which provided that GM would not institute contempt or breach-of-contract proceedings against Elwell for giving subpoenaed testimony in another court or tribunal. Thereafter, the Bakers, petitioners here, subpoenaed Elwell to testify in their product liability action against GM, commenced in Missouri state court and removed by GM to federal court, in which the Bakers alleged that a faulty GM fuel pump caused the vehicle fire that killed their mother. GM asserted that the Michigan injunction barred Elwell's testimony. After *in camera* review of the Michigan injunction and the settlement agreement, the District Court allowed the Bakers to depose Elwell and to call him as a witness at trial, stating alternative grounds for its ruling: (1) Michigan's injunction need not be enforced because blocking Elwell's testimony would violate Missouri's *223 "public policy," which shielded from disclosure only privileged or otherwise confidential information; (2) just as the injunction could be modified in Michigan, so a court elsewhere could modify the decree. Elwell testified for the Bakers at trial, and they were awarded \$11.3 million in damages. The Eighth Circuit reversed, ruling, *inter alia*, that Elwell's testimony should not have been admitted. Assuming, *arguendo*, the existence of a public **659 policy exception to the full faith and credit command, the court concluded that the District Court erroneously relied on Missouri's policy favoring disclosure of relevant, nonprivileged information, for Missouri has an "equally strong public policy in favor of full faith and credit." The court also determined that the evidence was insufficient to show that the Michigan court would modify the injunction barring Elwell's testimony.

Held: Elwell may testify in the Missouri action without offense to the national full faith and credit command. Pp. 663–668.

(a) The animating purpose of the Constitution's Full Faith and Credit Clause "was to alter the status of the several states as independent foreign sovereignties, each free to

ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin." *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277, 56 S.Ct. 229, 234, 80 L.Ed. 220. As to judgments, the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. See, e.g., *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367, 373, 116 S.Ct. 873, 877, 134 L.Ed.2d 6. A court may be guided by the forum State's "public policy" in determining the *law* applicable to a controversy, see *Nevada v. Hall*, 440 U.S. 410, 421–424, 99 S.Ct. 1182, 1188–1190, 59 L.Ed.2d 416, but this Court's decisions support no roving "public policy exception" to the full faith and credit due *judgments*, see, e.g., *Estin v. Estin*, 334 U.S. 541, 546, 68 S.Ct. 1213, 1217, 92 L.Ed. 1561. In assuming the existence of a ubiquitous "public policy exception" permitting one State to resist recognition of another's judgment, the District Court in the Bakers' action misread this Court's precedent. Further, the Court has never placed equity decrees outside the full faith and credit domain. Equity decrees for the payment of money have long been considered equivalent to judgments at law entitled to nationwide recognition. See, e.g., *Barber v. Barber*, 323 U.S. 77, 65 S.Ct. 137, 89 L.Ed. 82. There is no reason why the preclusive effects of an adjudication on parties and those "in privity" with them, *i.e.*, claim preclusion and issue preclusion, should differ depending solely upon the type of relief sought in a civil action. Cf., e.g., *id.*, at 87, 65 S.Ct., at 141–142 (Jackson, J., concurring). Full faith *224 and credit, however, does not mean that enforcement measures must travel with the sister state judgment as preclusive effects do; such measures remain subject to the evenhanded control of forum law. See *McElmoyle ex rel. Bailey v. Cohen*, 13 Pet. 312, 325, 10 L.Ed. 177. Orders commanding action or inaction have been denied enforcement in a sister State when they purported to accomplish an official act within the exclusive province of that other State or interfered with litigation over which the ordering State had no authority. See, e.g., *Fall v. Eastin*, 215 U.S. 1, 30 S.Ct. 3, 54 L.Ed. 65. Pp. 663–665.

(b) With these background principles in view, this Court turns to the dimensions of the order GM relies upon to stop Elwell's testimony and asks: What matters did the Michigan injunction legitimately conclude? Although the Michigan order is *claim* preclusive between Elwell and GM, Michigan's judgment cannot reach beyond the Elwell–GM controversy to control proceedings against

GM brought in other States, by other parties, asserting claims the merits of which Michigan has not considered. Michigan has no power over those parties, and no basis for commanding them to become intervenors in the Elwell–GM dispute. See *Martin v. Wilks*, 490 U.S. 755, 761–763, 109 S.Ct. 2180, 2184–2185, 104 L.Ed.2d 835. Most essentially, although Michigan’s decree could operate against Elwell to preclude him from *volunteering* his testimony in another jurisdiction, a Michigan court cannot, by entering the injunction to which Elwell and GM stipulated, dictate to a court in another jurisdiction that evidence relevant in the Bakers’ case—a controversy to which Michigan is foreign—shall be inadmissible. This conclusion creates no general exception to the full faith and credit command, and surely does not permit a State to refuse to honor a sister ****660** state judgment based on the forum’s choice of law or policy preferences. This Court simply recognizes, however, that, just as the mechanisms for enforcing a judgment do not travel with the judgment itself for purposes of full faith and credit, and just as one State’s judgment cannot automatically transfer title to land in another State, similarly the Michigan decree cannot determine evidentiary issues in a lawsuit brought by parties who were not subject to the jurisdiction of the Michigan court. Cf. *United States v. Nixon*, 418 U.S. 683, 710, 94 S.Ct. 3090, 3108–3109, 41 L.Ed.2d 1039. The language of the consent decree, excluding from its scope the then-pending Georgia action, is informative. If the Michigan order would have interfered with the Georgia court’s jurisdiction, Michigan’s ban would, in the same way, interfere with the jurisdiction of courts in other States in similar cases. GM recognized the interference potential of the consent decree by agreeing not to institute contempt or breach-of-contract proceedings against Elwell for giving subpoenaed testimony elsewhere. That GM ruled out resort to the court that entered the ****225** injunction is telling, for injunctions are ordinarily enforced by the enjoining court, not by a surrogate tribunal. Pp. 666–668.

86 F.3d 811 (C.A.8 1996), reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and STEVENS, SOUTER, and BREYER, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 668. KENNEDY, J., filed an opinion concurring in the judgment, in which O’CONNOR and THOMAS, JJ., joined, *post*, p. 668.

Attorneys and Law Firms

Laurence H. Tribe, Cambridge, MA, for petitioners.

Paul T. Cappuccio, Washington, DC, for respondent.

Opinion

Justice GINSBURG delivered the opinion of the Court.

This case concerns the authority of one State’s court to order that a witness’ testimony shall not be heard in any ****226** court of the United States. In settlement of claims and counterclaims precipitated by the discharge of Ronald Elwell, a former General Motors Corporation (GM) engineering analyst, GM paid Elwell an undisclosed sum of money, and the parties agreed to a permanent injunction. As stipulated by GM and Elwell and entered by a Michigan County Court, the injunction prohibited Elwell from “testifying, without the prior written consent of [GM], ... as ... a witness of any kind ... in any litigation already filed, or to be filed in the future, involving [GM] as an owner, seller, manufacturer and/or designer” GM separately agreed, however, that if Elwell were ordered to testify by a court or other tribunal, such testimony would not be actionable as a violation of the Michigan court’s injunction or the GM–Elwell agreement.

After entry of the stipulated injunction in Michigan, Elwell was subpoenaed to testify in a product liability action commenced in Missouri by plaintiffs who were not involved in the Michigan case. The question presented is whether the national full faith and credit command bars Elwell’s testimony in the Missouri case. We hold that Elwell may testify in the Missouri action without offense to the full faith and credit requirement.

I

Two lawsuits, initiated by different parties in different States, gave rise to the full faith and credit issue before us. One suit involved a severed employment relationship, the other, a wrongful-death complaint. We describe each controversy in turn.

A

The Suit Between Elwell and General Motors

Ronald Elwell was a GM employee from 1959 until 1989. For 15 of those years, beginning in 1971, Elwell was assigned to the Engineering Analysis Group, which studied the performance of GM vehicles, most particularly ****661** vehicles involved in product liability litigation. Elwell’s studies and research concentrated on

vehicular fires. He assisted in *227 improving the performance of GM products by suggesting changes in fuel line designs. During the course of his employment, Elwell frequently aided GM lawyers engaged in defending GM against product liability actions. Beginning in 1987, the Elwell–GM employment relationship soured. GM and Elwell first negotiated an agreement under which Elwell would retire after serving as a GM consultant for two years. When the time came for Elwell to retire, however, disagreement again surfaced and continued into 1991.

In May 1991, plaintiffs in a product liability action pending in Georgia deposed Elwell. The Georgia case involved a GM pickup truck fuel tank that burst into flames just after a collision. During the deposition, and over the objection of counsel for GM, Elwell gave testimony that differed markedly from testimony he had given when serving as an in-house expert witness for GM. Specifically, Elwell had several times defended the safety and crashworthiness of the pickup’s fuel system. On deposition in the Georgia action, however, Elwell testified that the GM pickup truck fuel system was inferior in comparison to competing products.

A month later, Elwell sued GM in a Michigan County Court, alleging wrongful discharge and other tort and contract claims. GM counterclaimed, contending that Elwell had breached his fiduciary duty to GM by disclosing privileged and confidential information and misappropriating documents. In response to GM’s motion for a preliminary injunction, and after a hearing, the Michigan trial court, on November 22, 1991, enjoined Elwell from

“consulting or discussing with or disclosing to any person any of General Motors Corporation’s trade secrets[,] confidential information or matters of attorney-client work product relating in any manner to the subject matter of any products liability litigation whether already filed or [to be] filed in the future which Ronald Elwell received, had knowledge of, or was entrusted with during *228 his employments with General Motors Corporation.” *Elwell v. General Motors Corp.*, No. 91–115946NZ (Wayne Cty.) (Order Granting in Part, Denying in Part Injunctive Relief, pp. 1–2), App. 9–10.

In August 1992, GM and Elwell entered into a settlement under which Elwell received an undisclosed sum of money. The parties also stipulated to the entry of a permanent injunction and jointly filed with the Michigan court both the stipulation and the agreed-upon injunction. The proposed permanent injunction contained two proscriptions. The first substantially repeated the terms of

the preliminary injunction; the second comprehensively enjoined Elwell from

“testifying, without the prior written consent of General Motors Corporation, either upon deposition or at trial, as an expert witness, or as a witness of any kind, and from consulting with attorneys or their agents in any litigation already filed, or to be filed in the future, involving General Motors Corporation as an owner, seller, manufacturer and/or designer of the product(s) in issue.” Order Dismissing Plaintiff’s Complaint and Granting Permanent Injunction (Wayne Cty., Aug. 26, 1992), p. 2, App. 30.

To this encompassing bar, the consent injunction made an exception: “[This provision] shall not operate to *interfere with the jurisdiction of the Court in ... Georgia* [where the litigation involving the fuel tank was still pending].” *Ibid.* (emphasis added). No other noninterference provision appears in the stipulated decree. On August 26, 1992, with no further hearing, the Michigan court entered the injunction precisely as tendered by the parties.¹

Although the stipulated injunction contained an exception only for the Georgia action then pending, Elwell and GM included in their separate settlement agreement a more general *229 limitation. If a court or other tribunal ordered Elwell to testify, his testimony would “in no way” support a GM **662 action for violation of the injunction or the settlement agreement:

“ ‘It is agreed that [Elwell’s] appearance and testimony, if any, at hearings on Motions to quash subpoena or at deposition or trial or other official proceeding, if the Court or other tribunal so orders, will in no way form a basis for an action in violation of the Permanent Injunction or this Agreement.’ ” Settlement Agreement, p. 10, as quoted in 86 F.3d 811, 820, n. 11 (C.A.8 1996).

In the six years since the Elwell–GM settlement, Elwell has testified against GM both in Georgia (pursuant to the exception contained in the injunction) and in several other jurisdictions in which Elwell has been subpoenaed to testify.

B

The Suit Between the Bakers and General Motors

Having described the Elwell–GM employment termination litigation, we next summarize the

wrongful-death complaint underlying this case. The decedent, Beverly Garner, was a front-seat passenger in a 1985 Chevrolet S-10 Blazer involved in a February 1990 Missouri highway accident. The Blazer's engine caught fire, and both driver and passenger died. In September 1991, Garner's sons, Kenneth and Steven Baker, commenced a wrongful-death product liability action against GM in a Missouri state court. The Bakers alleged that a faulty fuel pump in the 1985 Blazer caused the engine fire that killed their mother. GM removed the case to federal court on the basis of the parties' diverse citizenship. On the merits, GM asserted that the fuel pump was neither faulty nor the cause of the fire, and that collision impact injuries alone caused Garner's death.

The Bakers sought both to depose Elwell and to call him as a witness at trial. GM objected to Elwell's appearance as a deponent or trial witness on the ground that the Michigan *230 injunction barred his testimony. In response, the Bakers urged that the Michigan injunction did not override a Missouri subpoena for Elwell's testimony. The Bakers further noted that, under the Elwell-GM settlement agreement, Elwell could testify if a court so ordered, and such testimony would not be actionable as a violation of the Michigan injunction.

After *in camera* review of the Michigan injunction and the settlement agreement, the Federal District Court in Missouri allowed the Bakers to depose Elwell and to call him as a witness at trial. Responding to GM's objection, the District Court stated alternative grounds for its ruling: (1) Michigan's injunction need not be enforced because blocking Elwell's testimony would violate Missouri's "public policy," which shielded from disclosure only privileged or otherwise confidential information; (2) just as the injunction could be modified in Michigan, so a court elsewhere could modify the decree.

At trial, Elwell testified in support of the Bakers' claim that the alleged defect in the fuel pump system contributed to the postcollision fire. In addition, he identified and described a 1973 internal GM memorandum bearing on the risk of fuel-fed engine fires. Following trial, the jury awarded the Bakers \$11.3 million in damages, and the District Court entered judgment on the jury's verdict.

The United States Court of Appeals for the Eighth Circuit reversed the District Court's judgment, ruling, *inter alia*, that Elwell's testimony should not have been admitted. 86 F.3d 811 (1996). Assuming, *arguendo*, the existence of a public policy exception to the full faith and credit command, the Court of Appeals concluded that the District Court erroneously relied on Missouri's policy

favoring disclosure of relevant, nonprivileged information, see *id.*, at 818-819, for Missouri has an "equally strong public policy in favor of full faith and credit," *id.*, at 819.

The Eighth Circuit also determined that the evidence was insufficient to show that the Michigan court would modify *231 the injunction barring Elwell's testimony. See *id.*, at 819-820. The Court of Appeals observed that the Michigan court "has been asked on several occasions to modify the injunction, [but] has yet to do so," and noted that, if the Michigan court did not intend to block Elwell's **663 testimony in cases like the Bakers', "the injunction would ... have been unnecessary." *Id.*, at 820.

We granted certiorari to decide whether the full faith and credit requirement stops the Bakers, who were not parties to the Michigan proceeding, from obtaining Elwell's testimony in their Missouri wrongful-death action. 520 U.S. 1142, 117 S.Ct. 1310, 137 L.Ed.2d 474 (1997).²

II

A

The Constitution's Full Faith and Credit Clause provides:

"Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Art. IV, § 1.³

Pursuant to that Clause, Congress has prescribed:

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or *232 usage in the courts of such State, Territory or Possession from which they are taken." 28 U.S.C. § 1738.⁴

The animating purpose of the full faith and credit command, as this Court explained in *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 56 S.Ct. 229, 80 L.Ed. 220 (1935),

"was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral

parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.” *Id.*, at 277, 56 S.Ct., at 234.

See also *Estin v. Estin*, 334 U.S. 541, 546, 68 S.Ct. 1213, 1217, 92 L.Ed. 1561 (1948) (the Full Faith and Credit Clause “substituted a command for the earlier principles of comity and thus basically altered the status of the States as independent sovereigns”).

[1] [2] Our precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments. “In numerous cases this Court has held that credit must be given to the judgment of another state although the forum would not be required to entertain the suit on which the judgment was founded.” *Milwaukee County*, 296 U.S., at 277, 56 S.Ct., at 234. The Full Faith and Credit Clause does not compel “a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.” *Pacific Employers Ins. Co. v. Industrial Accident Comm’n*, 306 U.S. 493, 501, 59 S.Ct. 629, 632, 83 L.Ed. 940 (1939); see *Phillips *233 Petroleum Co. v. Shutts*, 472 U.S. 797, 818–819, 105 S.Ct. 2965, 2977–2978, 86 L.Ed.2d 628 (1985). Regarding judgments, however, the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court **664 with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. For claim and issue preclusion (*res judicata*) purposes,⁵ in other words, the judgment of the rendering State gains nationwide force. See, e.g., *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367, 373, 116 S.Ct. 873, 878, 134 L.Ed.2d 6 (1996); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 485, 102 S.Ct. 1883, 1899, 72 L.Ed.2d 262 (1982); see also Reese & Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 Colum. L.Rev. 153 (1949).

[3] [4] A court may be guided by the forum State’s “public policy” in determining the law applicable to a controversy. See *Nevada v. Hall*, 440 U.S. 410, 421–424, 99 S.Ct. 1182, 1188–1190, 59 L.Ed.2d 416 (1979).⁶ But our decisions support no roving “public policy exception” to the full faith and credit due judgments. See *Estin*, 334 U.S., at 546, 68 S.Ct., at 1217 (Full Faith and Credit Clause “ordered submission ... even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it.”); *Fauntleroy v. Lum*, 210 U.S. 230, 237, 28 S.Ct. 641, 643, 52 L.Ed. 1039 (1908) (judgment of Missouri court *234 entitled to full faith and credit in Mississippi even if Missouri judgment rested on a misapprehension of Mississippi law). In

assuming the existence of a ubiquitous “public policy exception” permitting one State to resist recognition of another State’s judgment, the District Court in the Bakers’ wrongful-death action, see *supra*, at 662, misread our precedent. “The full faith and credit clause is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign States into a nation.” *Sherrer v. Sherrer*, 334 U.S. 343, 355, 68 S.Ct. 1087, 1092–1093, 92 L.Ed. 1429 (1948). We are “aware of [no] considerations of local policy or law which could rightly be deemed to impair the force and effect which the full faith and credit clause and the Act of Congress require to be given to [a money] judgment outside the state of its rendition.” *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 438, 64 S.Ct. 208, 213, 88 L.Ed. 149 (1943).

[5] The Court has never placed equity decrees outside the full faith and credit domain. Equity decrees for the payment of money have long been considered equivalent to judgments at law entitled to nationwide recognition. See, e.g., *Barber v. Barber*, 323 U.S. 77, 65 S.Ct. 137, 89 L.Ed. 82 (1944) (unconditional adjudication of petitioner’s right to recover a sum of money is entitled to full faith and credit); see also A. Ehrenzweig, *Conflict of Laws* § 51, p. 182 (rev. ed.1962) (describing as “indefensible” the old doctrine that an equity decree, because it does not “merge” the claim into the judgment, does not qualify for recognition). We see no reason why the preclusive effects of an adjudication on parties and those “in privity” with them, *i.e.*, claim preclusion and issue preclusion (*res judicata* and collateral estoppel),⁷ should differ depending solely upon the type of relief sought in a civil action. Cf. *235 *Barber*, 323 U.S., at 87, 65 S.Ct., at 141–142 (Jackson, J., concurring) **665 (Full Faith and Credit Clause and its implementing statute speak not of “judgments” but of “judicial proceedings” without limitation”); Fed. Rule Civ. Proc. 2 (providing for “one form of action to be known as ‘civil action,’” in lieu of discretely labeled actions at law and suits in equity).

[6] Full faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the evenhanded control of forum law. See *McElmoyle ex rel. Bailey v. Cohen*, 13 Pet. 312, 325, 10 L.Ed. 177 (1839) (judgment may be enforced only as “laws [of enforcing forum] may permit”); see also Restatement (Second) of Conflict of Laws § 99 (1969) (“The local law of the forum determines the methods by which a judgment of another state is enforced.”).⁸

¹⁷ Orders commanding action or inaction have been denied enforcement in a sister State when they purported to accomplish an official act within the exclusive province of that other State or interfered with litigation over which the ordering State had no authority. Thus, a sister State's decree concerning land ownership in another State has been held ineffective *to transfer title*, see *Fall v. Eastin*, 215 U.S. 1, 30 S.Ct. 3, 54 L.Ed. 65 (1909), although such a decree may indeed preclusively adjudicate the rights and obligations running between the *parties* to the foreign litigation, see, e.g., *Robertson v. Howard*, 229 U.S. 254, 261, 33 S.Ct. 854, 856, 57 L.Ed. 1174 (1913) ("[I]t may not be doubted that a *236 court of equity in one State in a proper case could compel a defendant before it to convey property situated in another State."). And antisuit injunctions regarding litigation elsewhere, even if compatible with due process as a direction constraining parties to the decree, see *Cole v. Cunningham*, 133 U.S. 107, 10 S.Ct. 269, 33 L.Ed. 538 (1890), in fact have not controlled the second court's actions regarding litigation in that court. See, e.g., *James v. Grand Trunk Western R. Co.*, 14 Ill.2d 356, 372, 152 N.E.2d 858, 867 (1958); see also E. Scoles & P. Hay, *Conflict of Laws* § 24.21, p. 981 (2d ed.1992) (observing that antisuit injunction "does not address, and thus has no preclusive effect on, the merits of the litigation [in the second forum]").⁹ Sanctions for violations of an injunction, in any event, are generally administered by the court that issued the injunction. See, e.g., *Stiller v. Hardman*, 324 F.2d 626, 628 (C.A.2 1963) (nonrendition forum enforces monetary relief portion of a judgment but leaves enforcement of injunctive portion to rendition forum).

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With these background principles in view, we turn to the dimensions of the order GM relies upon to stop Elwell's testimony. Specifically, we take up the question: What matters did the Michigan injunction legitimately conclude?

As earlier recounted, see *supra*, at 661–662, the parties before the Michigan County Court, Elwell and GM, submitted an agreed-upon injunction, which the presiding judge signed.¹⁰ While no issue was joined, expressly litigated, and determined in the Michigan proceeding,¹¹ that order is *claim* preclusive between Elwell and GM. Elwell's claim for *238 wrongful discharge and his related contract and tort claims have "merged in the judgment," and he cannot sue again to recover more. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, n. 5,

99 S.Ct. 645, 649, n. 5, 58 L.Ed.2d 552 (1979) ("Under the doctrine of *res judicata*, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action."); see also Restatement (Second) of Judgments § 17 (1980). Similarly, GM cannot sue Elwell elsewhere on the counterclaim GM asserted in Michigan. See *id.*, § 23, Comment *a*, p. 194 ("A defendant who interposes a counterclaim is, in substance, a plaintiff, as far as the counterclaim is concerned, and the plaintiff is, in substance, a defendant.").

¹⁸ Michigan's judgment, however, cannot reach beyond the Elwell–GM controversy to control proceedings against GM brought in other States, by other parties, asserting claims the merits of which Michigan has not considered. Michigan has no power over those parties, and no basis for commanding them to become intervenors in the Elwell–GM dispute. See *Martin v. Wilks*, 490 U.S. 755, 761–763, 109 S.Ct. 2180, 2184–2185, 104 L.Ed.2d 835 (1989). Most essentially, Michigan lacks authority to control courts elsewhere by precluding them, in actions brought by strangers to the Michigan litigation, from determining for themselves what witnesses are competent to testify and what evidence is relevant and admissible in their search for the truth. See Restatement (Second) of Conflict of Laws §§ 137–139 (1969 and rev.1988) (forum's own law governs witness competence and grounds for excluding evidence); cf. *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 544, n. 29, 107 S.Ct. 2542, 2556, n. 29, 96 L.Ed.2d 461 (1987) (foreign "blocking statute" barring disclosure of certain information "do[es] not deprive an American court of the power to order a party subject to its jurisdiction to produce [the information]"); *United States v. First Nat. City Bank*, 396 F.2d 897 (C.A.2 1968) (New York bank may not refuse to produce records of its German branch, even **667 though doing so might subject the bank to civil liability under German law).

*239 As the District Court recognized, Michigan's decree could operate against Elwell to preclude him from *volunteering* his testimony. See App. to Pet. for Cert. 26a–27a. But a Michigan court cannot, by entering the injunction to which Elwell and GM stipulated, dictate to a court in another jurisdiction that evidence relevant in the Bakers' case—a controversy to which Michigan is foreign—shall be inadmissible. This conclusion creates no general exception to the full faith and credit command, and surely does not permit a State to refuse to honor a sister state judgment based on the forum's choice of law or policy preferences. Rather, we simply recognize that, just as the mechanisms for enforcing a judgment do not

travel with the judgment itself for purposes of full faith and credit, see *McElmoyle ex rel. Bailey v. Cohen*, 13 Pet. 312, 10 L.Ed. 177 (1839); see also Restatement (Second) of Conflict of Laws § 99, and just as one State's judgment cannot automatically transfer title to land in another State, see *Fall v. Eastin*, 215 U.S. 1, 30 S.Ct. 3, 54 L.Ed. 65 (1909), similarly the Michigan decree cannot determine evidentiary issues in a lawsuit brought by parties who were not subject to the jurisdiction of the Michigan court. Cf. *United States v. Nixon*, 418 U.S. 683, 710, 94 S.Ct. 3090, 3108–3109, 41 L.Ed.2d 1039 (1974) (“[E]xceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.”).¹²

***240** The language of the consent decree is informative in this regard. Excluding the then-pending Georgia action from the ban on testimony by Elwell without GM's permission, the decree provides that it “shall not operate to *interfere with the jurisdiction* of the Court in ... Georgia.” *Elwell v. General Motors Corp.*, No. 91–115946NZ (Wayne Cty.) (Order Dismissing Plaintiff's Complaint and Granting Permanent Injunction, p. 2), App. 30 (emphasis added). But if the Michigan order, extended to the Georgia case, would have “interfer[ed] with the jurisdiction” of the Georgia court, Michigan's ban would, in the same way, “interfere with the jurisdiction” of courts in other States in cases similar to the one pending in Georgia.

In line with its recognition of the interference potential of the consent decree, GM provided in the settlement agreement that, if another court ordered Elwell to testify, his testimony would “in no way” render him vulnerable to suit in Michigan for violation of the injunction or agreement. See 86 F.3d, at 815, 820, n. 11. The Eighth Circuit regarded this settlement agreement provision as merely a concession by GM that “some courts might fail to extend full faith and credit to the [Michigan] injunction.” *Ibid.* As we have explained, however, Michigan's power does not reach into a Missouri courtroom to displace the forum's own determination whether to admit or exclude evidence relevant in the Bakers' wrongful-death case before it. In that light, we see no altruism in GM's agreement not to institute contempt or breach-of-contract proceedings against Elwell in Michigan for giving subpoenaed testimony elsewhere. Rather, we find it telling that GM ruled out resort to the court that entered the injunction, for injunctions are ordinarily enforced by the enjoining court, not by a surrogate tribunal. See *supra*, at 665.

In sum, Michigan has no authority to shield a witness from another jurisdiction's subpoena power in a case

involving persons and causes outside Michigan's governance. Recognition, ***241** under full faith and credit, is owed to dispositions Michigan has authority to order. But a Michigan decree cannot ****668** command obedience elsewhere on a matter the Michigan court lacks authority to resolve. See *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 282–283, 100 S.Ct. 2647, 2661, 65 L.Ed.2d 757 (1980) (plurality opinion) (“Full faith and credit must be given to [a] determination that [a State's tribunal] had the authority to make; but by a parity of reasoning, full faith and credit need not be given to determinations that it had no power to make.”).

* * *

For the reasons stated, the judgment of the Court of Appeals for the Eighth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice SCALIA, concurring in the judgment.

I agree with the Court that enforcement measures do not travel with sister-state judgments as preclusive effects do. *Ante*, at 665. It has long been established that “the judgment of a state Court cannot be enforced out of the state by an execution issued within it.” *McElmoyle ex rel. Bailey v. Cohen*, 13 Pet. 312, 325, 10 L.Ed. 177 (1839). To recite that principle is to decide this case.

General Motors asked a District Court in Missouri to *enforce* a Michigan injunction. The Missouri court was no more obliged to enforce the Michigan injunction by preventing Elwell from presenting his testimony than it was obliged to enforce it by holding Elwell in contempt. The Full Faith and Credit Clause “‘did not make the judgments of other States domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them, *as evidence*. No execution can issue upon such judgments without a new suit in the tribunals of other States.’” *Thompson v. Whitman*, 18 Wall. 457, 462–463, 21 L.Ed. 897 (1873) (emphasis ***242** added) (quoting J. Story, Conflict of Laws § 609 (7th ed. 1872)). A judgment or decree of one State, to be sure, may be grounds for an action (or a defense to one) in another. But the Clause and its implementing statute

“establish a rule of evidence, rather than of jurisdiction. While they make the record of a judgment, rendered

after due notice in one State, conclusive evidence in the courts of another State, or of the United States, of the matter adjudged, they do not affect the jurisdiction, either of the court in which the judgment is rendered, or of the court in which it is offered in evidence. Judgments recovered in one State of the Union, when proved in the courts of another government, whether state or national, within the United States, differ from judgments recovered in a foreign country in no other respect than in not being reexaminable on their merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties.” *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 291–292, 8 S.Ct. 1370, 1375, 32 L.Ed. 239 (1888) (citation omitted).

The judgment that General Motors obtained in Michigan “does not carry with it, into another State, the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another State, it must be made a judgment there; and can only be executed in the latter as its laws may permit.” *Lynde v. Lynde*, 181 U.S. 183, 187, 21 S.Ct. 555, 556, 45 L.Ed. 810 (1901) (quoting *McElmoyle*, *supra*, 13 Pet. at 325). See, e.g., *Watts v. Waddle*, 6 Pet. 389, 392, 8 L.Ed. 437 (1832), a case involving a suit to obtain an equity decree ordering the conveyance of land, duplicating such a decree already issued in another State.

Because neither the Full Faith and Credit Clause nor its implementing statute requires Missouri to execute the injunction issued by the courts of Michigan, I concur in the judgment.

***243** Justice KENNEDY, with whom Justice O’CONNOR and Justice THOMAS join, concurring in the judgment.

I concur in the judgment. In my view the case is controlled by well-settled full faith and credit principles which render the majority’s extended analysis unnecessary and, with ****669** all due respect, problematic in some degree. This separate opinion explains my approach.

I

The majority, of course, is correct to hold that when a judgment is presented to the courts of a second State it may not be denied enforcement based upon some disagreement with the laws of the State of rendition. Full

faith and credit forbids the second State to question a judgment on these grounds. There can be little doubt of this proposition. We have often recognized the second State’s obligation to give effect to another State’s judgments even when the law underlying those judgments contravenes the public policy of the second State. See, e.g., *Estin v. Estin*, 334 U.S. 541, 544–546, 68 S.Ct. 1213, 1216–1217, 92 L.Ed. 1561 (1948); *Sherrer v. Sherrer*, 334 U.S. 343, 354–355, 68 S.Ct. 1087, 1092–1093, 92 L.Ed. 1429 (1948); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 438, 64 S.Ct. 208, 213, 88 L.Ed. 149 (1943); *Williams v. North Carolina*, 317 U.S. 287, 294–295, 63 S.Ct. 207, 210–212, 87 L.Ed. 279 (1942); *Fauntleroy v. Lum*, 210 U.S. 230, 237, 28 S.Ct. 641, 643, 52 L.Ed. 1039 (1908).

My concern is that the majority, having stated the principle, proceeds to disregard it by announcing two broad exceptions. First, the majority would allow courts outside the issuing State to decline to enforce those judgments “purport[ing] to accomplish an official act within the exclusive province of [a sister] State.” *Ante*, at 665. Second, the basic rule of full faith and credit is said not to cover injunctions “interfer[ing] with litigation over which the ordering State had no authority.” *Ibid.*, at 665. The exceptions the majority recognizes are neither consistent with its rejection of a public policy exception to full faith and credit nor in accord with established rules implementing the Full Faith and Credit Clause. As employed to resolve this case, furthermore, the ***244** exceptions to full faith and credit have a potential for disrupting judgments, and this ought to give us considerable pause.

Our decisions have been careful not to foreclose all effect for the types of injunctions the majority would place outside the ambit of full faith and credit. These authorities seem to be disregarded by today’s holding. For example, the majority chooses to discuss the extent to which courts may compel the conveyance of property in other jurisdictions. That subject has proved to be quite difficult. Some of our cases uphold actions by state courts affecting land outside their territorial reach. E.g., *Robertson v. Howard*, 229 U.S. 254, 261, 33 S.Ct. 854, 856, 57 L.Ed. 1174 (1913) (“[I]t may not be doubted that a court of equity in one State in a proper case could compel a defendant before it to convey property situated in another State”); see also *Carpenter v. Strange*, 141 U.S. 87, 105–106, 11 S.Ct. 960, 966, 35 L.Ed. 640 (1891); *Muller v. Dows*, 94 U.S. 444, 449, 24 L.Ed. 207 (1876); *Massie v. Watts*, 6 Cranch 148, 3 L.Ed. 181 (1810). See generally 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2945, pp. 98–102 (2d ed.1995); *Restatement (Second) of Conflict of Laws* §

102, Comment *d* (1969); Reese, Full Faith and Credit to Foreign Equity Decrees, 42 Iowa L.Rev. 183, 199–200 (1957). Nor have we undertaken before today to announce an exception which denies full faith and credit based on the principle that the prior judgment interferes with litigation pending in another jurisdiction. See, e.g., *Cole v. Cunningham*, 133 U.S. 107, 116–117, 10 S.Ct. 269, 272, 33 L.Ed. 538 (1890); *Simon v. Southern R. Co.*, 236 U.S. 115, 122, 35 S.Ct. 255, 257, 59 L.Ed. 492 (1915); cf. *Baltimore & Ohio R. Co. v. Kepner*, 314 U.S. 44, 51–52, 62 S.Ct. 6, 9–10, 86 L.Ed. 28 (1941); *Donovan v. Dallas*, 377 U.S. 408, 415–418, 84 S.Ct. 1579, 1583–1585, 12 L.Ed.2d 409 (1964) (Harlan, J., dissenting). See generally Reese, *supra*, at 198 (“[T]he Supreme Court has not yet had occasion to determine whether [the practice of ignoring antisuit injunctions] is consistent with full faith and credit”). As a general matter, there is disagreement among the state courts as to their duty to recognize decrees enjoining proceedings in other courts. See Schopler, Extraterritorial recognition of, and propriety of counterinjunction against, injunction *245 against actions in courts of other states, 74 A.L.R.2d 831–834, §§ 3–4 (1960 and Supp.1986).

****670** Subjects which are at once so fundamental and so delicate as these ought to be addressed only in a case necessarily requiring their discussion, and even then with caution lest we announce rules which will not be sound in later application. See Restatement, *supra*, § 102, Comment *c* (“The Supreme Court of the United States has not had occasion to determine whether full faith and credit requires a State of the United States to enforce a valid judgment of a sister State that orders the doing of an act other than the payment of money or that enjoins the doing of an act”); E. Scoles & P. Hay, Conflict of Laws § 24.9, p. 964 (2d ed.1992) (noting that interstate recognition of equity decrees other than divorce decrees and decrees ordering payment of money “has been a matter of some uncertainty”). We might be required to hold, if some future case raises the issue, that an otherwise valid judgment cannot intrude upon essential processes of courts outside the issuing State in certain narrow circumstances, but we need not announce or define that principle here. Even if some qualification of full faith and credit were required where the judicial processes of a second State are sought to be controlled in their procedural and institutional aspects, the Court’s discussion does not provide sufficient guidance on how this exception should be construed in light of our precedents. The majority’s broad review of these matters does not articulate the rationale underlying its conclusions. In the absence of more elaboration, it is unclear what it is about the particular injunction here that renders it undeserving of full faith and credit. The Court’s

reliance upon unidentified principles to justify omitting certain types of injunctions from the doctrine’s application leaves its decision in uneasy tension with its own rejection of a broad public policy exception to full faith and credit.

The following example illustrates the uncertainty surrounding the majority’s approach. Suppose the Bakers had anticipated the need for Elwell’s testimony in Missouri and *246 had appeared in a Michigan court to litigate the privileged character of the testimony it sought to elicit. Assume further the law on privilege were the same in both jurisdictions. If Elwell, General Motors (GM), and the Bakers were before the Michigan court and Michigan law gave its own injunction preclusive effect, the Bakers could not relitigate the point, if general principles of issue preclusion control. Perhaps the argument can be made, as the majority appears to say, that the integrity of Missouri’s judicial processes demands a rule allowing relitigation of the issue; but, for the reasons given below, we need not confront this interesting question.

In any event, the rule would be an exception. Full faith and credit requires courts to do more than provide for direct enforcement of the judgments issued by other States. It also “requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged.” *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 466, 102 S.Ct. 1883, 1889, 72 L.Ed.2d 262 (1982); accord, *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 525, 106 S.Ct. 768, 772–773, 88 L.Ed.2d 877 (1986); *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380–381, 384, 105 S.Ct. 1327, 1331–1332, 1334, 84 L.Ed.2d 274 (1985); *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 81, 104 S.Ct. 892, 896, 79 L.Ed.2d 56 (1984); *Haring v. Prosise*, 462 U.S. 306, 313, 103 S.Ct. 2368, 2373, 76 L.Ed.2d 595 (1983); *Allen v. McCurry*, 449 U.S. 90, 96, 101 S.Ct. 411, 415–416, 66 L.Ed.2d 308 (1980). Through full faith and credit, “the local doctrines of *res judicata*, speaking generally, become a part of national jurisprudence....” *Riley v. New York Trust Co.*, 315 U.S. 343, 349, 62 S.Ct. 608, 612, 86 L.Ed. 885 (1942). And whether or not an injunction is enforceable in another State on its own terms, the courts of a second State are required to honor its issue preclusive effects. See *Parsons Steel*, *supra*; 18 Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 4467, p. 635 (1981).

II

In the case before us, of course, the Bakers were neither parties to the earlier litigation nor subject to the jurisdiction *247 of the Michigan courts. The majority pays scant **671 attention to this circumstance, which becomes critical. The beginning point of full faith and credit analysis requires a determination of the effect the judgment has in the courts of the issuing State. In our most recent full faith and credit cases, we have said that determining the force and effect of a judgment should be the first step in our analysis. *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367, 375, 116 S.Ct. 873, 878, 134 L.Ed.2d 6 (1996); *Marrese, supra*, at 381–382, 105 S.Ct., at 1332–1333; *Haring, supra*, at 314, 103 S.Ct., at 2373–2374; see also *Kremer, supra*, at 466–467, 102 S.Ct., at 1889–1890. “If the state courts would not give preclusive effect to the prior judgment, ‘the courts of the United States can accord it no greater efficacy’ under § 1738.” *Haring, supra*, at 313, n. 6, 103 S.Ct., at 2373, n. 6 (quoting *Union & Planters’ Bank v. Memphis*, 189 U.S. 71, 75, 23 S.Ct. 604, 606, 47 L.Ed. 712 (1903)); accord, *Marrese*, 470 U.S., at 384, 105 S.Ct., at 1334. A conclusion that the issuing State would not give the prior judgment preclusive effect ends the inquiry, making it unnecessary to determine the existence of any exceptions to full faith and credit. *Id.*, at 383, 386, 105 S.Ct., at 1333, 1334–1335. We cannot decline to inquire into these state-law questions when the inquiry will obviate new extensions or exceptions to full faith and credit. See *Haring, supra*, at 314, n. 8, 103 S.Ct., at 2374, n. 8.

If we honor the undoubted principle that courts need give a prior judgment no more force or effect than the issuing State gives it, the case before us is resolved. Here the Court of Appeals and both parties in their arguments before our Court seemed to embrace the assumption that Michigan would apply the full force of its judgment to the Bakers. Michigan law does not appear to support the assumption.

The simple fact is that the Bakers were not parties to the Michigan proceedings, and nothing indicates Michigan would make the novel assertion that its earlier injunction binds the Bakers or any other party not then before it or subject to its jurisdiction. For collateral estoppel to apply under Michigan law, “‘the same parties must have had a full opportunity to litigate the issue, and there must be mutuality of estoppel.’” *248 *Nummer v. Treasury Dept.*, 448 Mich. 534, 542, 533 N.W.2d 250, 253 (quoting *Storey v. Meijer, Inc.*, 431 Mich. 368, 373, n. 3, 429 N.W.2d 169, 171, n. 3 (1988)), cert. denied, 516 U.S. 964, 116 S.Ct. 418, 133 L.Ed.2d 335 (1995). “Although there is a trend in modern law to abolish the requirement of mutuality, this Court reaffirmed its commitment to that

doctrine in 1971 in [*Howell v. Vito’s Trucking & Excavating Co.*, 386 Mich. 37, 191 N.W.2d 313]. Mutuality of estoppel remains the law in this jurisdiction...” *Lichon v. American Universal Ins. Co.*, 435 Mich. 408, 427–428, 459 N.W.2d 288, 298 (1990) (footnote omitted). Since the Bakers were not parties to the Michigan proceedings and had no opportunity to litigate any of the issues presented, it appears that Michigan law would not treat them as bound by the judgment. The majority cites no authority to the contrary.

It makes no difference that the judgment in question is an injunction. The Michigan Supreme Court has twice rejected arguments that injunctions have preclusive effect in later litigation, relying in no small part on the fact that the persons against whom preclusion is asserted were not parties to the earlier litigation. *Bacon v. Walden*, 186 Mich. 139, 144, 152 N.W. 1061, 1063 (1915) (“Defendant was not a party to [the prior injunctive] suit and was not as a matter of law affected or bound by the decree rendered in it”); *Detroit v. Detroit Ry.*, 134 Mich. 11, 15, 95 N.W. 992, 993 (1903) (“[T]he fact that defendant was in no way a party to the record is sufficient answer to the contention that the holding of the circuit judge in that [prior injunctive] case is a controlling determination of the present”).

The opinion of the Court of Appeals suggests the Michigan court which issued the injunction intended to bind third parties in litigation in other States. 86 F.3d 811, 820 (C.A.8 1996). The question, however, is not what a trial court intended in a particular case but the preclusive effect its judgment has under the controlling legal principles of its own State. Full faith and credit measures the effect of a judgment by all the laws of the rendering State, including authoritative *249 rulings of that State’s highest court on **672 questions of issue preclusion and jurisdiction over third parties. See *Kremer*, 456 U.S., at 466, 102 S.Ct., at 1889–1890; *Matsushita, supra*, at 375, 116 S.Ct. at 878.

The fact that other Michigan trial courts refused to reconsider the injunction but instead required litigants to return to the trial court which issued it in the first place sheds little light on the substance of issue preclusion law in Michigan. In construing state law, we must determine how the highest court of the State would decide an issue. See *King v. Order of United Commercial Travelers of America*, 333 U.S. 153, 160–161, 68 S.Ct. 488, 492–493, 92 L.Ed. 608 (1948); *Commissioner v. Estate of Bosch*, 387 U.S. 456, 464–465, 87 S.Ct. 1776, 1782–1783, 18 L.Ed.2d 886 (1967).

In this case, moreover, those Michigan trial courts which

declined to modify the injunction did not appear to base their rulings on preclusion law. They relied instead on Michigan Court Rule 2.613(B), which directs parties wishing to modify an injunction to present their arguments to the court which entered it. See Brief for Respondent 10. Rule 2.613(B) is a procedural rule based on comity concerns, not a preclusion rule. It reflects Michigan's determination that, within the State of Michigan itself, respect for the issuing court and judicial resources are best preserved by allowing the issuing court to determine whether the injunction should apply to further proceedings. As a procedural rule, it is not binding on courts of another State by virtue of full faith and credit. See *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722, 108 S.Ct. 2117, 2122, 100 L.Ed.2d 743 (1988) ("[A] State may apply its own procedural rules to actions litigated in its courts"). The Bakers have never appeared in a Michigan court, and full faith and credit cannot be used to force them to subject themselves to Michigan's jurisdiction. See *Baker v. Baker, Eccles & Co.*, 242 U.S. 394, 403, 37 S.Ct. 152, 155–156, 61 L.Ed. 386 (1917) ("And to assume that a party resident beyond the confines of a State is required to come within its borders and submit his personal controversy to its tribunals upon receiving notice of the suit at the place of his residence is a futile attempt *250 to extend the authority and control of a State beyond its own territory").

Under Michigan law, the burden of persuasion rests on the party raising preclusion as a defense. See *Detroit v. Qualls*, 434 Mich. 340, 357–358, 454 N.W.2d 374, 383 (1990); *E & G Finance Co. v. Simms*, 362 Mich. 592, 596, 107 N.W.2d 911, 914 (1961). In light of these doctrines and the absence of contrary authority, one cannot conclude that GM has carried its burden of showing that Michigan courts would bind the Bakers to the terms of the earlier injunction prohibiting Elwell from testifying. The result should come as no surprise. It is most unlikely that Michigan would give a judgment preclusive effect against a person who was not a party to the proceeding in which it was entered or who was not otherwise subject to the jurisdiction of the issuing court. See *Kremer, supra*, at 480–481, 102 S.Ct., at 1897 ("We have previously recognized that the judicially created doctrine of collateral estoppel does not apply when the

party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate the claim or issue").

Although inconsistent on this point, GM disavows its desire to issue preclude the Bakers, claiming "the only party being 'bound' to the injunction is Elwell." Brief for Respondent 39. This is difficult to accept because in assessing the preclusive reach of a judgment we look to its practical effect. *E.g.*, *Martin v. Wilks*, 490 U.S. 755, 765, n. 6, 109 S.Ct. 2180, 2186 n. 6, 104 L.Ed.2d 835 (1989); *cf.*, *e.g.*, *Donovan v. Dallas*, 377 U.S., at 413, 84 S.Ct., at 1582 ("[I]t does not matter that the prohibition here was addressed to the parties rather than to the federal court itself"); *Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co.*, 309 U.S. 4, 9, 60 S.Ct. 215, 218, 84 L.Ed. 537 (1940) ("That the injunction was a restraint of the parties and was not formally directed against the state court itself is immaterial"). Despite its disclaimer, GM seeks to alter the course of the suit between it and the Bakers by preventing the Bakers from litigating the admissibility of Elwell's testimony. Furthermore, even were we to accept GM's argument that *251 the Bakers are essentially irrelevant to this dispute, GM's argument **673 is flawed on its own terms. Elwell, in the present litigation, does not seek to relitigate anything; he is a witness, not a party.

In all events, determining as a threshold matter the extent to which Michigan law gives preclusive effect to the injunction eliminates the need to decide whether full faith and credit applies to equitable decrees as a general matter or the extent to which the general rules of full faith and credit are subject to exceptions. Michigan law would not seek to bind the Bakers to the injunction and that suffices to resolve the case. For these reasons, I concur in the judgment.

Parallel Citations

118 S.Ct. 657, 139 L.Ed.2d 580, 66 USLW 4060, 98 Cal. Daily Op. Serv. 282, 98 Daily Journal D.A.R. 383, 98 CJ C.A.R. 163, 11 Fla. L. Weekly Fed. S 289

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

¹ A judge new to the case, not the judge who conducted a hearing at the preliminary injunction stage, presided at the settlement stage and entered the permanent injunction.

² In conflict with the Eighth Circuit, many other lower courts have permitted Elwell to testify as to nonprivileged and

non-trade-secret matters. See Addendum to Brief for Petitioners (citing cases).

- 3 Predating the Constitution, the Articles of Confederation contained a provision of the same order: “Full faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other State.” Articles of Confederation, Art. IV. For a concise history of full faith and credit, see Jackson, Full Faith and Credit—The Lawyer’s Clause of the Constitution, 45 Colum. L.Rev. 1 (1945).
- 4 The first Congress enacted the original full faith and credit statute in May 1790. See Act of May 26, 1790, ch. 11, 1 Stat. 122 (codified as amended at 28 U.S.C. § 1738) (“And the said records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken.”). Although the text of the statute has been revised since then, the command for full faith and credit to judgments has remained constant.
- 5 “Res judicata” is the term traditionally used to describe two discrete effects: (1) what we now call claim preclusion (a valid final adjudication of a claim precludes a second action on that claim or any part of it), see Restatement (Second) of Judgments §§ 17–19 (1982); and (2) issue preclusion, long called “collateral estoppel” (an issue of fact or law, actually litigated and resolved by a valid final judgment, binds the parties in a subsequent action, whether on the same or a different claim), see *id.*, § 27. On use of the plain English terms claim and issue preclusion in lieu of res judicata and collateral estoppel, see *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 77, n. 1, 104 S.Ct. 892, 894, n. 1, 79 L.Ed.2d 56 (1984).
- 6 See also Paulsen & Sovern, “Public Policy” in the Conflict of Laws, 56 Colum. L.Rev. 969, 980–981 (1956) (noting traditional but dubious use of the term “public policy” to obscure “an assertion of the forum’s right to have its [own] law applied to the [controversy] because of the forum’s relationship to it”).
- 7 See *supra*, at 664, n. 5; 18 Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 4467, p. 635 (1981) (Although “[a] second state need not directly enforce an injunction entered by another state ... [it] may often be required to honor the issue preclusion effects of the first judgment.”).
- 8 Congress has provided for the interdistrict registration of federal-court judgments for the recovery of money or property. 28 U.S.C. § 1963 (upon registration, the judgment “shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner”). A similar interstate registration procedure is effective in most States, as a result of widespread adoption of the Revised Uniform Enforcement of Foreign Judgments Act, 13 U.L.A. 149 (1986). See *id.*, at 13 (Supp.1997) (Table) (listing adoptions in 44 States and the District of Columbia).
- 9 This Court has held it impermissible for a state court to enjoin a party from proceeding in a federal court, see *Donovan v. Dallas*, 377 U.S. 408, 84 S.Ct. 1579, 12 L.Ed.2d 409 (1964), but has not yet ruled on the credit due to a state- court injunction barring a party from maintaining litigation in another State, see Ginsburg, Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments, 82 Harv. L.Rev. 798, 823 (1969); see also Reese, Full Faith and Credit to Foreign Equity Decrees, 42 Iowa L.Rev. 183, 198 (1957) (urging that, although this Court “has not yet had occasion to determine [the issue], ... full faith and credit does not require dismissal of an action whose prosecution has been enjoined,” for to hold otherwise “would mean in effect that the courts of one state can control what goes on in the courts of another”). State courts that have dealt with the question have, in the main, regarded antisuit injunctions as outside the full faith and credit ambit. See Ginsburg, 82 Haw.L.Rev. at 823, and n. 99; see also *id.*, at 828–829 (“The current state of the law, permitting [an antisuit] injunction to issue but not compelling any deference outside the rendering state, may be the most reasonable compromise between ... extreme alternatives,” *i.e.*, “[a] general rule of respect for antisuit injunctions running between state courts,” or “a general rule denying the states authority to issue injunctions directed at proceedings in other states”).
- 10 GM emphasizes that a key factor warranting the injunction was Elwell’s inability to assure that any testimony he might give would steer clear of knowledge he gained from protected confidential communications. See Brief for Respondent 28–29; see also *id.*, at 32 (contending that Elwell’s testimony “is pervasively and uncontrollably leavened with General Motors’ privileged information”). Petitioners assert, and GM does not dispute, however, that at no point during Elwell’s testimony in the Bakers’ wrongful-death action did GM object to any question or answer on the grounds of attorney-client, attorney-work product, or trade secrets privilege. See Brief for Petitioners 9.
- 11 In no event, we have observed, can issue preclusion be invoked against one who did not participate in the prior adjudication. See *Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313, 329, 91 S.Ct. 1434, 1443, 28 L.Ed.2d 788 (1971); *Hansberry v. Lee*, 311 U.S. 32, 40, 61 S.Ct. 115, 117, 85 L.Ed. 22 (1940). Thus, Justice KENNEDY emphasizes the obvious in noting that the Michigan judgment has no preclusive effect on the Bakers, for they were not parties to the Michigan litigation. See *post*, at 670–671. Such an observation misses the thrust of GM’s argument. GM readily acknowledges “the commonplace rule that a person may not be bound by a judgment *in personam* in a case to which he was not made a party.” Brief for Respondent 35. But, GM adds, the Michigan decree does not bind the Bakers; it binds *Elwell* only. Most forcibly, GM insists

that the Bakers cannot object to the binding effect GM seeks for the Michigan judgment because the Bakers have no constitutionally protected interest in obtaining the testimony of a particular witness. See *id.*, at 39 (“[T]he only party being ‘bound’ to the injunction is Elwell, and holding him to his legal obligations does not violate anyone’s due process rights.”). Given this argument, it is clear that issue preclusion principles, standing alone, cannot resolve the controversy GM presents.

- ¹² Justice KENNEDY inexplicably reads into our decision a sweeping exception to full faith and credit based solely on “the integrity of Missouri’s judicial processes.” *Post*, at 670. The Michigan judgment is not entitled to full faith and credit, we have endeavored to make plain, because it impermissibly interferes with Missouri’s control of litigation *brought by parties who were not before the Michigan court*. Thus, Justice KENNEDY’s hypothetical, see *ibid.*, misses the mark. If the Bakers had been parties to the Michigan proceedings and had actually litigated the privileged character of Elwell’s testimony, the Bakers would of course be precluded from relitigating that issue in Missouri. See *Cromwell v. County of Sac*, 94 U.S. 351, 354, 24 L.Ed. 195 (1876) (“[D]etermination of a question directly involved in one action is conclusive as to that question in a second suit between the same parties....”); see also *supra*, at 664, n. 5.

21 Cal.3d 829
Supreme Court of California.

George WILLIAMSON, Petitioner,
v.
The SUPERIOR COURT OF LOS ANGELES
COUNTY, Respondent;
SHELL OIL COMPANY et al., Real Parties in
Interest.

L.A. 30754. | Aug. 14, 1978. | Rehearing Denied Sept.
14, 1978.

Plaintiff in personal injury action petitioned for a writ of mandate to compel the Superior Court, Los Angeles County, to require disclosure of a report prepared by an expert employed by counsel for one of the defendants. The Supreme Court, Tobriner, J., held that: (1) an arrangement whereby tire manufacturer agreed to indemnify its codefendant, the manufacturer of a tire-changing machine, if the codefendant would withdraw a certain expert witness whose report was unfavorable to the tire manufacturer amounted to a bargain for the concealment or suppression of evidence, and (2) because the manufacturer of the tire-changing machine could not be permitted to withhold an expert's report that would have been discoverable but for the payment of consideration by one of the parties to the litigation, full disclosure of the expert's report was required.

Writ of mandate issued.

Richardson, J., dissented and filed opinion.

Opinion, 135 Cal.Rptr. 744, vacated.

West Headnotes (11)

[1] **Pretrial Procedure**
🔑 Work-product privilege

As an expert opinion developed as a result of the initiative of counsel in preparing for trial of personal injury action, investigator's report concerning cause of accident which occurred while tire-changing machine was being used constituted the 'work product' of counsel for the

machine's manufacturer, and thus was entitled to the conditional or qualified protection for the "work product" of an attorney. West's Ann.Code Civ.Proc. §§ 2016, 2016(b, g).

11 Cases that cite this headnote

[2] **Pretrial Procedure**
🔑 Facts known and opinions held by experts

When it becomes reasonably certain that an expert will give his professional opinion as a witness on a material matter in dispute, then the expert's opinion has become a factor in the case and, at that point, the expert ceases to be merely a consultant and becomes a counter in the litigation to be evaluated by appropriate pretrial discovery. West's Ann.Code Civ.Proc. § 2016.

2 Cases that cite this headnote

[3] **Pretrial Procedure**
🔑 Facts known and opinions held by experts

While "good cause" normally must be shown to compel discovery of expert opinions in advance of trial, "good cause" includes a showing that the expert may be called as a witness.

3 Cases that cite this headnote

[4] **Attorney and Client**
🔑 Conduct of trial

An attorney acting in the best interest of his client must be free to make whatever use of an expert's opinion will be most likely to insure a good result for the client at trial; thus, an attorney may properly decide not to call as a witness even an expert whose opinion is favorable to the client if, in the attorney's judgment, the client's interests will otherwise be

better served.

Cases that cite this headnote

[5]

Evidence

🔑 Evidence Withheld or Falsified

Evidence

🔑 Suppression or spoliation of evidence

The rule embodied in the Evidence Code provision which permits the trier of fact to consider, among other things, a party's failure to explain or to deny evidence against him or a party's willful suppression of evidence is predicated on common sense and public policy and reflects the purpose of a trial which is to arrive at the true facts. West's Ann.Evid.Code, § 413.

4 Cases that cite this headnote

[6]

Evidence

🔑 Evidence Withheld or Falsified

Though a party is not under a duty to produce testimony adverse to himself, if he fails to produce evidence that would naturally have been produced he must take the risk that the trier of fact will infer that the evidence, had it been produced, would have been adverse. West's Ann.Evid.Code, § 413.

4 Cases that cite this headnote

[7]

Pretrial Procedure

🔑 Work-product privilege

Although work product rules are designed explicitly to protect a party's expense and industry in seeking out expert testimony, no policy underlying the work product doctrine justified arrangement whereby, in return for a codefendant's promise of indemnification, defendant who originally intended to call a

certain expert as a witness at trial withdrew the expert as a witness. West's Ann.Code Civ.Proc. § 2016.

13 Cases that cite this headnote

[8]

Pretrial Procedure

🔑 Discovering truth, narrowing issues, and eliminating surprise

One of the principal purposes of discovery is to make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest possible extent.

2 Cases that cite this headnote

[9]

Contracts

🔑 Contracts with witnesses

Agreement whereby, in return for tire manufacturer's promise to pay consideration, manufacturer of tire-changing machine agreed to withdraw as an expert witness an investigator who had concluded that the cause of the accident which gave rise to the suit was a defective tire and not any defect in the tire-changing machine was a bargain for the concealment or suppression of evidence which could not be condoned.

4 Cases that cite this headnote

[10]

Pretrial Procedure

🔑 Facts known and opinions held by experts

Where withdrawal of expert witness directly flowed from defendants' illegal agreement to suppress evidence, full disclosure of the expert witness' report was required to prevent defendants from reaping any untoward benefit from their attempted illegal agreement. West's Ann.Code Civ.Proc. § 2016(b).

13 Cases that cite this headnote

[11] Contracts

🔑 Procuring or suppressing evidence and prosecuting action

Court cannot place its imprimatur upon planned stratagems of purchased suppression of evidence.

Cases that cite this headnote

Attorneys and Law Firms

***831 **128 ***41** Belli & Choulos, Belli, Ashe & Choulos, Irmas, Simke, Chodos & Marshall, Irmas, Simke & Chodos, Roman M. Silberfeld and David Manning Chodos, Los Angeles, for petitioner.

No appearance for respondent.

Morgan, Wenzel & McNicholas, Dennis J. Sinclitico, George H. Ellis, Belcher, Henzie & Biegenzahn, Leo J. Biegenzahn and Uzzell S. Branson, III, Los Angeles, for real parties in interest.

Opinion

***832** TOBRINER, Justice.

In this petition for writ of mandate plaintiff seeks to discover a report prepared by an expert employed by counsel for one of the defendants in the underlying personal injury suit. Defendant had originally intended to call the expert as a witness at trial, and hence, under the relevant statute and case law, the expert's report would normally have been discoverable by plaintiff. In return for a codefendant's promise of indemnification, however, the defendant who employed the expert subsequently withdrew him as a witness. This case therefore presents the question whether the withdrawal of the expert witness on the basis of such an indemnification agreement reestablishes the privilege against disclosure enjoyed by defendant or leaves the plaintiff free to discover the content of the report. Although the trial court denied

plaintiff access to the report, we have concluded that under the circumstances of this case plaintiff is entitled to discover the contents of the report.

In September 1971, plaintiff George Williamson filed suit against defendants Shell Oil Company (Shell), Firestone Tire and Rubber Company (Firestone), and Big Four Automotive Equipment Corporation (Big Four), seeking damages for personal injuries which he sustained in Shell's employ while using a tire-changing machine manufactured by Big Four to install a Firestone tire. Plaintiff alleged defects in both the tire and the tire-changing machine.

During the course of discovery proceedings, Big Four employed O. Edward Kurt to investigate the accident and to submit a report. Following his investigation, Kurt submitted a report which stated that in his opinion the cause of the accident was Firestone's defective tire, and not any defect in the Big Four machine. After receiving this report, which, of course, was quite favorable to its case, Big Four designated Kurt as an expert witness to testify at trial. Plaintiff arranged to take Kurt's deposition and thereby to learn the results of Kurt's investigation.

Plaintiff, however, never learned the results of the investigation. On the eve of Kurt's scheduled deposition, and following a meeting with Firestone's counsel, Big Four withdrew Kurt's designation as expert witness. Plaintiff states without contradiction that at the meeting between defendants' counsel, Big Four discussed Kurt's findings with Firestone ***833** and turned over copies of Kurt's report to Firestone.¹ After examining the report, Firestone's counsel, who naturally preferred the nondisclosure of Kurt's adverse findings, entered into an agreement with Big Four which provided that if Big Four withdrew Kurt as a witness, withheld his report from plaintiff's counsel, and refused to permit plaintiff's counsel to depose him, Firestone would indemnify Big Four against any liability Big Four might incur arising from plaintiff's injuries. In other words, Big Four agreed to silence its expert and withhold the information contained in his report from plaintiff ****129** in return for valuable consideration indemnification from Firestone.

Big Four thereafter complied with its promise to Firestone, withdrawing Kurt as a prospective witness and rebuffing plaintiff's *****42** attempt to depose Kurt or to obtain a copy of Kurt's report. Plaintiff sought an order of the trial court to compel Kurt's deposition and production of his report. Although the trial court authorized the deposition, it substantially limited the areas of plaintiff's inquiry, precluding plaintiff from discovering the results of Kurt's investigation and his analysis of the accident.

Plaintiff then filed a petition for writ of mandate in the Court of Appeal, seeking relief from the trial court's order. Although recognizing that extraordinary writs should not issue routinely in discovery cases, the Court of Appeal concluded that because the case presented "questions of first impression that are of general importance to the trial courts and to the profession" (*Oceanside Union School Dist. v. Superior Court* (1962) 58 Cal.2d 180, 185-186, fn. 4, 23 Cal.Rptr. 375, 378, 373 P.2d 439, 442; see also *Pacific Tel. & Tel. Co. v. Superior Court* (1970) 2 Cal.3d 161, 169-171, 84 Cal.Rptr. 718, 465 P.2d 854), an alternative writ should issue. After a hearing, the Court of Appeal ultimately determined that a preemptory writ of mandate should issue; we granted a hearing in order to resolve the novel issue of work product doctrine which this case presents.

Code of Civil Procedure section 2016, subdivision (b) provides in pertinent part, "The work product of an attorney shall not be discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing his claim or defense or will result in an injustice, and any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not ***834** be discoverable under any circumstances." Accordingly, subdivision (b) affords a conditional or qualified protection for work product generally, and an absolute protection as to an attorney's impressions and conclusions. As subdivision (g) of the same section explains, "It is the policy of this state (i) to preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases and (ii) to prevent an attorney from taking undue advantage of his adversary's industry or efforts."

^[1] Section 2016 contains no definition of work product beyond extending protection to "any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories." The cases indicate generally, however, that "material of a derivative character, such as diagrams prepared for trial, audit reports, appraisals, and Other expert opinions, developed as a result of the initiative of counsel in preparing for trial," are also to be protected as work product. (Emphasis added.) (*Mack v. Superior Court* (1968) 259 Cal.App.2d 7, 10, 66 Cal.Rptr. 280, 283; accord, *Southern Pacific Co. v. Superior Court* (1969) 3 Cal.App.3d 195, 198-199.) In *San Diego Professional Association v. Superior Court* (1962) 58 Cal.2d 194, 204-205, 23 Cal.Rptr. 384, 373 P.2d 448, for example, we held that expert engineers' "evaluation and opinions" commissioned by an attorney for the purpose of preparing for trial was work product. "Whatever the extent of the concept of an attorney's work product may

be, it is clear that . . . it is . . . the attorney's work, or that of his agents or employees, that is involved" (Emphasis omitted.) (*Wilson v. Superior Court* (1964) 226 Cal.App.2d 715, 724, 38 Cal.Rptr. 255, 261 (hg. den., May 27, 1964).) Thus as an expert opinion, developed as a result of the initiative of counsel in preparing for trial, Kurt's report clearly constitutes the work product of Big Four's counsel.

^[2] ^[3] The issue before us, however, is whether Kurt's report, as work product of Big Four's counsel, should be protected against disclosure under section 2016. While it may be appropriate to give broad immunity from discovery to an expert Consultant's Report developed at the initiative ****130** of counsel in preparation for trial, the courts agree that the initial status of the expert as consultant changes once the expert becomes a designated prospective witness. As the court stated in *****43** *Swartzman v. Superior Court* (1964) 231 Cal.App.2d 195, 203, 41 Cal.Rptr. 721, 727, hg. den., Feb. 10, 1965, "(w)hen it becomes reasonably certain an expert will give his professional opinion as a witness on a material matter in dispute, then his opinion has ***835** become a factor in the cause. At that point the expert has ceased to be merely a consultant and has become a counter in the litigation, one to be evaluated along with others. Such evaluation properly includes appropriate pretrial discovery." (See also *Mize v. Atchinson, T. & S.F. Ry. Co.* (1975) 46 Cal.App.3d 436, 449, 120 Cal.Rptr. 787; *Bolles v. Superior Court* (1971) 15 Cal.App.3d 962, 963, 93 Cal.Rptr. 719; *Dow Chemical Co. v. Superior Court* (1969) 2 Cal.App.3d 1, 10, 82 Cal.Rptr. 288; *Scotsman Manufacturing Co. v. Superior Court* (1966) 242 Cal.App.2d 527, 530-532, 51 Cal.Rptr. 511.) While good cause normally must be shown to compel discovery of expert opinions in advance of trial, good cause includes a showing that the expert may be called as a witness. (See *Sanders v. Superior Court* (1973) 34 Cal.App.3d 270, 279, 109 Cal.Rptr. 770.)

^[4] In the present case, the expert consultant did not long retain his initial status as advisor, for after learning the favorable nature of Kurt's report, Big Four designated Kurt as an expert witness to testify at trial. Indisputedly at this point plaintiff was entitled to discover Kurt's report; if Big Four had used Kurt's testimony at trial, the report would surely have remained discoverable. Before Kurt's scheduled deposition took place, however, Big Four withdrew Kurt's designation as a witness. Big Four argues that its withdrawal of Kurt as witness restored the immunity from discovery which Kurt's report originally enjoyed. As Big Four contends, an attorney acting in the best interest of his client must be free to make whatever use of an expert's opinion will be most likely to insure a

good result for the client at trial; thus an attorney may properly decide not to call as a witness even an expert whose opinion is favorable to the client, if, in the attorney's judgment, the client's interests will otherwise be better served.

[5] [6] While a party may, indeed, enjoy the right to withdraw an expert witness at any time prior to disclosure of that witness' proposed testimony,² the record in the present case demonstrates that Big Four did ***836** not decide unilaterally to withdraw Kurt as a matter of trial tactics or personal litigation strategy. Big Four's decision stemmed rather from the agreement with Firestone: Firestone offered to pay Big Four to withdraw Kurt, in order to eliminate Kurt's potentially damaging testimony from the trial. Thus it was under Firestone's influence and in response to an offer of payment of indemnification that Big Four secured Kurt's withdrawal.

We do not accept defendants' argument that their action merely represents the sharing of information between two nonadversary codefendants, and therefore constitutes proper cooperation between parties sharing a common interest. The court in ****131** Gorman Rupp Industries, Inc. v. Superior Court (1971) 20 Cal.App.3d 28, 31, 97 Cal.Rptr. 377, 380, explained that the fact that two parties are both defendants in no sense assures that they are not adversaries: "Each codefendant seeks to disclaim any responsibility for the alleged injuries, and *****44** argues that if there is responsibility for the alleged injuries it is due to the failure of the other. Certainly, there exists that relationship which suggests a conflict of interest. Petitioner (codefendant) has a vital interest in not relying solely on its lack of negligence or other avoidance of liability. Petitioner seeks to meet plaintiff's claim by showing the liability, if any, is that of another defendant. This clearly falls within the (rule) that an 'adverse' party includes one who may likely strive to win a point at issue at the expense of the other."

With respect to the issue toward which the Kurt report was directed defects in Firestone's tire the interests of Big Four and Firestone unquestionably conflicted. Big Four's interest lay in finding no negligence on its own part and in discovering a defect responsible for the accident in someone else's product here, Firestone's. On the other hand, Firestone's interest lay in finding No defect in its product. Because Kurt was about to testify in favor of Big Four and against Firestone, only Firestone's offer of indemnification could have induced Big Four not to call its favorable witness.

Moreover, the agreement between Big Four and Firestone is not as benign as "normal cooperative action" between

codefendants bound by a common interest. Agreements to suppress evidence have long been held void as against public policy, both in California and in most common law ***837** jurisdictions.³ (See *Valentine v. Stewart* (1860) 15 Cal. 387, 404, in which this court invalidated a contract to withdraw depositions taken in connection with litigation, as "affected with a fatal taint of illegality"; Rest., Contracts, s 554; 6A Corbin, Contracts, s 1430, at p. 380: "A bargain for the concealment or suppression of . . . evidence is of course illegal.") The agreement at issue in the present case is clearly of such a nature. In return for Firestone's promise to pay consideration, Big Four has agreed to suppress highly relevant evidence which, if revealed at trial, would be harmful to Firestone. Defendants do not nullify the agreement's insidious effect by attaching to it the seemingly innocuous label of "contract of indemnification."

The court in *Petterson v. Superior Court* (1974) 39 Cal.App.3d 267, 114 Cal.Rptr. 20, anticipating the potential for encouraging just such illegal bargains, declared unequivocally that discovery should be allowed in order to deter similar suppression of evidence. In *Petterson*, counsel for one claimant under a holographic will disclosed to the executor the opinion of a handwriting expert that the will was a forgery. Subsequently, when the executor's attorney sought to depose the expert, counsel for another claimant under the holographic will objected on the ground that he had hired the expert as a consultant, and did not propose to call him as a witness at trial.

The court rejected the assertion of work product privilege, and held that the privilege was waived with respect to the handwriting expert's opinion by virtue of the disclosure of the expert's observations and conclusions by the first heir's attorney to the executor's attorney.⁴ In the course of ****132** its analysis, the court stated, "If we were to declare that petitioners now may prevent real parties from taking (the expert's) ***838** deposition, we would be setting a precedent which eventually could lead to subtle but *****45** deliberate attempts to suppress relevant evidence. The rule predicated on fairness articulated in the decisions is a shield to prevent a litigant from taking undue advantage of his adversary's industry and effort, not a sword to be used to thwart justice or to defeat the salutary objects of the Discovery Act." (39 Cal.App.3d at p. 273, 114 Cal.Rptr. at 24.)

[7] [8] [9] The *Petterson* court's reasoning is instructive: although the work product rules are designed explicitly to protect a party's expense and industry in seeking out expert testimony,⁵ no policy underlying the work product doctrine justifies defendants' conduct in the present case. If we were to hold otherwise, nothing would preclude a party in a multi-party case from in effect auctioning off a witness' testimony to the highest bidder. Although the present record does not disclose whether Big Four offered

to retain Kurt as a witness if plaintiff bid more for his testimony than Firestone, we point out that in the absence of compelled disclosure such competitive bidding would remain a grim possibility. One of the principal purposes of discovery is to “ ‘make a trial less a game of blindman’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest possible extent.’ ” (Greyhound v. Superior Court (1961) 56 Cal.2d 355, 376, 15 Cal.Rptr. 90, 99, 364 P.2d 266, 275.) We will not sanction the “gamesmanship” involved in the suppression of evidence by permitting Big Four to withhold an expert report which would have been discoverable but for the payment of consideration by one of the parties to this litigation.

[10] [11] The agreement between Firestone and Big Four clearly indicates the very real potential for “subtle but deliberate attempts to suppress relevant evidence.” The inevitable effect of the trial court’s order would be to condone defendants’ concealment of evidence, in direct contravention of this court’s insistence that neither party to such an agreement should receive the aid of a court in effectuating such an illegal scheme. (See Tappan v. Albany Brewing Co. (1889) 80 Cal. 570, 572, 22 P. 257.) This court cannot place its imprimatur upon planned stratagems of purchased suppression of evidence. Because Big Four’s withdrawal of Kurt directly flows from the illegal agreement to repress evidence, surely under section 2016, subdivision (b) “denial of discovery . . . (would) result in an injustice.” We therefore must order full disclosure of Kurt’s report to ***839** prevent Big Four and Firestone from reaping any untoward benefit from their attempted illegal agreement.

Let a peremptory writ of mandate issue as prayed.

BIRD, C. J., and MOSK and MANUEL, JJ., concur.

RICHARDSON, Justice, dissenting.

I respectfully dissent. As the majority opinion explains, it is well established that work product protection must be afforded to an experts’ reports and communications to an attorney employing him in preparation for trial at least until the expert has been designated as an actual trial witness. (See Mize v. Atchison, T. & S.F. Ry. Co. (1975) 46 Cal.App.3d 436, 449, 120 Cal.Rptr. 787; Petterson v. Superior Court (1974) 39 Cal.App.3d 267, 271-272, 114 Cal.Rptr. 20; Sanders v. Superior Court (1973) 34 Cal.App.3d 270, 278-279, 109 Cal.Rptr. 770; Bolles v. Superior Court (1971) 15 Cal.App.3d 962, 963, 93

Cal.Rptr. 719; Dow Chemical Co. v. Superior Court (1969) 2 Cal.App.3d 1, 9-10, 82 Cal.Rptr. 288; Mack v. Superior Court (1968) 259 Cal.App.2d 7, 10-11, 66 Cal.Rptr. 280; Scotsman Mfg. Co. v. Superior Court (1966) 242 Cal.App.2d 527, 529-532, 51 Cal.Rptr. 511; ****133** Swartzman v. Superior Court (1964) 231 Cal.App.2d 195, 202-203, 41 Cal.Rptr. 721.)

Under the foregoing rule, the Kurt report would have been protected from discovery by reason of Big Four’s announcement, prior *****46** to Kurt’s scheduled deposition, that Kurt would not be called to testify. The majority holds, however, that Big Four forfeited its work product protection because it agreed with Firestone to withdraw Kurt as a trial witness in return for Firestone’s promise of indemnification. The majority questions the legality of an agreement whereby one party “sells” his silence to another regarding potentially relevant evidence.

It does appear to be the general rule that “A bargain that has for its object or consideration the suppression of evidence . . . is illegal.” (Rest., Contracts, s 554; see 6A Corbin, Contracts, s 1430, at p. 380; see also Tappan v. Albany Brewing Co. (1889) 80 Cal. 570.) It is not as clear, however, that actual “suppression” of evidence is involved here. The work product rules, by very definition, in effect sanction a “suppression” of an expert’s report unless and until the decision is made to call the expert as a trial witness. Furthermore, assuming that the alleged agreement between Big Four and Firestone was illegal and unenforceable As between those parties, and that appropriate sanction might have been ***840** imposed, no compelling reason exists for our holding that the making of such an agreement resulted in a waiver by Big Four of its work product protection Vis-a-vis the plaintiff. Certainly, no such waiver was intended by Big Four who, having engaged Kurt, should retain the right to decide For itself whether or not to call him as a witness. The record discloses that at the present time he will not be called. Accordingly, under the authorities cited above, the Kurt report remains Conditionally protected from disclosure to plaintiff.

Under section 2016, subdivision (b), the Kurt report would be discoverable upon a showing of prejudice or injustice. Yet the trial court herein declined to enter such a finding of prejudice or injustice, possibly reflecting the fact that plaintiff had hired his own experts to investigate the accident. The underlying evidence, upon which Kurt’s expert conclusions were reached, presumably is fully accessible to plaintiff’s experts; at least it is not alleged that this evidence is not so available. If, in fact, Firestone’s tire was defective and caused or contributed to the accident, no reason whatever appears in the record why plaintiff’s experts cannot reach the same conclusion

as a result of their independent efforts.

Subdivision (g) of section 2016 announces a policy of this state to prevent an attorney from taking undue advantage of his adversary's efforts, as well as to protect his adversary's privacy which, it must always be borne in mind, is for the overriding protection of the lawyer's client. "Under such a policy a party cannot substitute the wits of his adversary's expert for wits of his own in analyzing the case. (Citation.)" (Swartzman v. Superior Court, supra, 231 Cal.App.2d 195, 203, 41 Cal.Rptr. 721, 727.)

I would deny the writ.

Footnotes

- 1 The inadequacy of the record prevents our consideration of the effect of any alleged disclosure between Big Four and plaintiff.
- 2 Compare Evidence Code section 413: "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case." As the court held in *Breland v. Traylor Engineering & Mfg. Co.* (1942) 52 Cal.App.2d 415, 426, 126 P.2d 455, 461, "The rule of (present Evidence Code section 413) . . . is predicated on common sense, and public policy. The purpose of a trial is to arrive at the true facts. A trial is not a game where one counsel safely may sit back and refuse to produce evidence where in the nature of things his client is the only source from which that evidence may be secured. A defendant is not under a duty to produce testimony adverse to himself, but if he fails to produce evidence that would naturally have been produced he must take the risk that the trier of fact will infer, and properly so, that the evidence, had it been produced, would have been adverse." (Emphasis added.)
- 3 Compare Penal Code section 136, subdivision (a): "Every person who willfully and unlawfully prevents or dissuades any person who is or may become a witness, from attending upon any trial, proceeding, or inquiry, authorized by law, is guilty of a misdemeanor"; and section 136 1/2: "Every person who gives or offers or promises to give to any witness or person about to be called as a witness, any bribe upon any understanding or agreement that such person shall not attend upon any trial or other judicial proceeding, or every person who attempts by means of any offer of a bribe to dissuade any such person from attending upon any trial or other judicial proceeding, is guilty of a felony." Although Firestone dealt exclusively with Big Four in attempting to silence Kurt, the effect of Firestone's agreement with Big Four is certainly analogous to an agreement directly with Kurt that Kurt "not attend upon . . . trial."
- 4 In the present case we do not reach plaintiff's argument that Big Four waived any work product privilege through disclosure to Firestone.
- 5 Contrary to defendants' suggestion, our decision does not in any way prevent plaintiffs or defendants from arranging in advance jointly to engage and consult a single expert, to promote economy of litigation.

CLARK, J., concurs.

Rehearing denied; CLARK, J., dissenting.

Parallel Citations

21 Cal.3d 829, 582 P.2d 126

200 W.Va. 270

Supreme Court of Appeals of West Virginia.

STATE of West Virginia ex rel. Linda WARD, as
Executrix of the Estate of L. David Ward, and
Linda Ward, Individually and as Mother and Next
Friend of Isaac Willard Ward, Benjamin David
Ward, Tiffany Sheree Ward and Kenneth Ryan
Ward, Petitioners,

v.

Honorable George W. HILL, Jr., Judge of the
Circuit Court of Wood County; F.G. Powderly,
M.D.; Bruce Pierson, Jr., M.D.; and Jorge E.
Prieto, M.D., Respondents.

No. 23989. | Submitted June 3, 1997. | Decided July
2, 1997.

Patient brought medical malpractice action in which three physicians were named as defendants. After plaintiff entered settlement with one physician, the Circuit Court, Wood County, George W. Hill, Jr., J., entered order which stated that remaining defendants could use witnesses originally listed as experts by settling physician. Plaintiff brought original proceeding for writ of prohibition, and the Supreme Court of Appeals, Starcher, J., held that: (1) trial court abused its discretion in holding hearing on motion where non-moving parties had almost no notice or time to prepare; (2) in litigation involving multiple defendants, settling defendant's expert witnesses should generally not be allowed to testify for remaining defendants; and (3) trial court abused its discretion in ruling that settling physician's experts could testify for remaining defendants.

Writ granted.

West Headnotes (14)

- [1] **Prohibition**
⚡ Remedy by appeal in particular actions or proceedings
Prohibition
⚡ Errors and irregularities

In determining whether to grant rule to show cause in prohibition when court is not acting in excess of its jurisdiction, Supreme Court of

Appeals looks to adequacy of other available remedies such as appeal, and to over-all economy of effort and money among litigants, lawyers and courts; however, prohibition is used in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts, and only in cases where there is high probability that trial will be completely reversed if error is not corrected in advance.

Cases that cite this headnote

- [2] **Prohibition**
⚡ Nature and scope of remedy

Because remedy sought by prohibition is extraordinary, exercise by Supreme Court of Appeals of its original jurisdiction in such matters is limited to circumstances of an extraordinary nature.

1 Cases that cite this headnote

- [3] **Prohibition**
⚡ Specific acts

Although most discovery orders are interlocutory and reviewable only after final judgment, in certain circumstances involving a purely legal issue, a clear cut error, inadequate alternate remedies, and judicial economy issues, Supreme Court of Appeals may issue writ of prohibition when circuit court abuses its discretion with regard to discovery.

1 Cases that cite this headnote

- [4] **Prohibition**
⚡ Errors and irregularities

Writ of prohibition is available to correct clear legal error resulting from trial court's substantial abuse of its discretion in regard to discovery orders.

Cases that cite this headnote

[5]

Appeal and Error

—Depositions, affidavits, or discovery

Circuit court's ruling on a discovery request is generally reviewed for an abuse of discretion.

2 Cases that cite this headnote

[6]

Motions

—Necessity

Purpose of requirement under Rules of Civil Procedure that notice of motion be given prior to hearing on motion is to prevent a party from being prejudicially surprised by a motion. Rules Civ.Proc., Rule 6(d).

Cases that cite this headnote

[7]

Constitutional Law

—Process or Other Notice

Motions

—Service and filing

While language of provision Rules of Civil Procedure governing notice prior to hearing on motion clearly permits reduction of time requirements for notice of hearing, where trial court, in so acting, reduces time requirements to extent that party entitled to notice is deprived of all opportunity to prepare for hearing, such action constitutes denial of due process of law and is in excess of jurisdiction. U.S.C.A. Const. Amend. 14; Rules Civ.Proc., Rule 6(d).

1 Cases that cite this headnote

[8]

Appeal and Error

—Proceedings Preliminary to Trial

Abuse of discretion standard is applied to orders reducing notice requirements established by Rules of Civil Procedure for motion practice. Rules Civ.Proc., Rule 6(d).

Cases that cite this headnote

[9]

Evidence

—Determination of question of competency

Trial court abused its discretion in holding hearing on motion by defendant in medical malpractice action, who sought determination that he would be allowed to call at trial experts listed by defendant who later entered settlement which purportedly barred settling defendants' experts from testifying for other parties, where non-moving parties learned only late on day before hearing that hearing was to be held and had almost no notice or time to prepare. Rules Civ.Proc., Rule 6(d).

3 Cases that cite this headnote

[10]

Appeal and Error

—Rulings on admissibility of evidence in general

Trial

—Admission of evidence in general

Rulings on admissibility of evidence are largely within trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion.

1 Cases that cite this headnote

[11]

Witnesses

🔑 Authority to compel attendance

Public has a right to every man's evidence, and exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of search for the truth.

Cases that cite this headnote

[12]

Compromise and Settlement

🔑 Nature and Requisites

Compromise and Settlement

🔑 Validity

Law favors and encourages resolution of controversies by contracts of compromise and settlement rather than by litigation, and it is policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy.

Cases that cite this headnote

[13]

Compromise and Settlement

🔑 Operation and Effect

Settlement agreement between plaintiff in medical malpractice action and one of three defendants originally named, condition of which was that all expert witnesses listed by settling defendant would be withdrawn and all depositions of witnesses scheduled by settling defendant would be cancelled, was effective to bar remaining defendants from calling as witnesses experts listed by settling defendant.

2 Cases that cite this headnote

[14]

Compromise and Settlement

🔑 Operation and Effect

Evidence

🔑 Disqualification; bias or conflict of interest

Absent a formal agreement among defendants in litigation proceeding involving multiple defendants, circuit court should not generally permit settling defendant's expert witnesses to testify for remaining defendants, and when settlement agreement between settling defendant and plaintiffs prohibits continued use of settling defendant's experts by remaining defendants, circuit court, subject to discovery rules, should honor that agreement by not permitting remaining defendants to use or present such information in preparation for or conduct of trial. Rules Civ.Proc., Rule 26(b)(4)(B).

3 Cases that cite this headnote

****26 *272 Syllabus by the Court**

1. " 'In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.' Syllabus Point 1, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979)." Syllabus Point 1, *State ex rel. U.S. Fidelity and Guar. Co. v. Canady*, 194 W.Va. 431, 460 S.E.2d 677 (1995).

2. " 'A writ of prohibition is available to correct a clear legal error resulting from a trial court's substantial abuse of its discretion in regard to discovery orders.' Syllabus Point 1, *State Farm Mutual Automobile Insurance Co. v. Stephens*, 188 W.Va. 622, 425 S.E.2d 577 (1992). Syllabus Point 3, *State ex rel. McCormick v. Zakaib*, 189 W.Va. 258, 430 S.E.2d 316 (1993)." Syllabus Point 2, *State ex rel. U.S. Fidelity and Guar. Co. v. Canady*, 194 W.Va. 431, 460 S.E.2d 677 (1995).

3. “While the language of Rule 6(d) of the Rules of Civil Procedure clearly permits a reduction of the time requirements for notice of hearing, where a trial court, in so acting, reduces time requirements to the extent that the party entitled to notice is deprived of all opportunity to prepare for hearing, such action constitutes a denial of due process of law and is in excess of jurisdiction.” Syllabus, *Cremeans v. Goad*, 158 W.Va. 192, 210 S.E.2d 169 (1974).

4. “ ‘The law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation; and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy.’ Syllabus Point 1, *Sanders v. Roselawn Memorial Gardens*, [Inc.] 152 W.Va. 91, 159 S.E.2d 784 (1968). Syllabus Point 2, *State ex rel. Vapor Corp. v. Narick*, [173] W.Va. [770] 320 S.E.2d 345 (1984).” Syllabus Point 1, *Riggle v. Allied Chemical Corp.*, 180 W.Va. 561, 378 S.E.2d 282 (1989).

5. “ ‘Rulings on the admissibility of evidence are largely within a trial court’s sound discretion and should not be disturbed unless there has been an abuse of discretion.’ *State v. Louk*, 171 W.Va. 639, 301 S.E.2d 596, 599 (1983)[, *overruled on other grounds*, *State v. Bradshaw*, 193 W.Va. 519, 457 S.E.2d 456 (1995)]. Syllabus Point 2, *State v. Peyatt*, [173] W.Va. [317] 315 S.E.2d 574 (1983). Syllabus Point 7, *State v. Miller*, [175] W.Va. [616] 336 S.E.2d 910 (1985).” Syllabus Point 10 of *Board of Ed. of McDowell County v. Zando, Martin & Milstead, Inc.*, 182 W.Va. 597, 390 S.E.2d 796 (1990).

6. Absent a formal agreement among defendants in a litigation involving multiple defendants, the circuit court should not generally permit a settling defendant’s expert witnesses to testify for the remaining defendants. When a settlement agreement between the settling defendant and the plaintiffs prohibits the continued use of the settling defendant’s expert witnesses by the remaining defendants, the circuit court, subject to Rule 26(b)(4)(B) [1988] of the *West Virginia Rules of Civil Procedure*, should honor that agreement by not permitting the remaining defendants to use or present such information in the preparation for or conduct of the trial.

Attorneys and Law Firms

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****27 *273** George W. Hill, Jr., pro se, Parkersburg.

William F. Foster, II, Jacobson, Maynard, Tuschman & Kalur, Charleston, for Respondent F.G. Powderly, M.D.

Stephen M. Fowler, Benjamin T. Hughes, Pullin, Knopf, Fowler & Flanagan, for Respondent Bruce Pierson, Jr., M.D.

Opinion

STARCHER, Justice.

This original proceeding for a writ of prohibition asks this Court to vacate a January 24, 1997 ruling of the Circuit Court of Wood County allowing the defendants who remain in the underlying case to use the expert witnesses designated by the defendant who settled his portion of the case. The relators raise two questions in their petition: first, did the circuit court violate Rule 6(d) [1978] of the *West Virginia Rules of Civil Procedure* by holding a hearing on a substantive issue when the relators, plaintiffs in the underlying medical malpractice suit, were provided less than twenty-four hours notice of the hearing? Second, did the circuit court err in allowing the remaining defendants to use the expert witnesses of the settling defendant even through the settlement agreement between the settling defendant and the relators prohibited such use of the settling defendant’s experts? Because the circuit court erred, we grant the requested writ.

I.

Facts and Background

The underlying case is a medical malpractice action brought by the Estate of David Ward, filed by his executrix and widow, Linda Ward, and the children of the decedent (the plaintiffs). The defendants were the decedent’s three (3) treating physicians, Jorge E. Prieto, M.D., F.G. Powderly, M.D., and Bruce Pierson, M.D. Trial in the case was scheduled for April 21, 1997 in the Wood County Circuit Court.¹

A discovery order entered on March 20, 1996 required the plaintiffs to identify their expert witnesses sixty (60) days after taking the defendants’ depositions. The defendants were required to identify their expert witnesses sixty (60) days from the disclosure of the plaintiffs’ expert witnesses, provided plaintiffs’ experts were “available for taking of their discovery depositions within the designated 60 day [sic] period.”

Plaintiffs identified their experts on June 17, 1996 with a supplement filed on June 21, 1996. On August 20, 1996, defendant Powderly filed his identification of expert witnesses naming one physician, and he included the following reservation:

This Defendant reserves the right to designate additional experts if it becomes necessary based on the testimony of Plaintiff's [sic] experts.

On August 16, 1996, defendant Pierson filed his identification of expert witnesses naming two physicians, and he included the following reservations:

Defendant reserves the right to call any witness identified by any other party to this litigation.

Defendant reserves the right to call any expert witness needed to impeach the credibility of plaintiff's [sic] expert witnesses.

Defendant reserves the right to supplement this expert witness list following further discovery.

Defendant Prieto, after requesting and receiving an extension, filed his identification of expert witnesses on December 17, 1996. Defendant Prieto identified by name ten physicians, including the three defendants, and generally any other physician associated with the decedent's care.

Depositions of the plaintiffs' experts were taken in the fall of 1996 through January 1997, and settlement negotiations between defendant Prieto and the plaintiffs were undertaken.

On January 17, 1997, the defendant Prieto and the plaintiffs appeared to reach a settlement. According to a letter dated January 22, 1997 from plaintiffs' counsel to counsel for defendant Prieto, the settlement was accepted based on the following pertinent conditions:

****28 *274** (2) The withdrawal of all experts listed by you on behalf of Dr. Prieto as experts to be called to testify on behalf of Dr. Prieto on ANY issue, including causation as well as negligence. (These experts are to have no contact with any party or that party's representative without court order authorizing and approving the same.)

(3) The immediate cancellation of any depositions scheduled by you on behalf of Dr. Prieto of any

witness, including any expert retained by and on behalf of Mrs. Ward. (emphasis in original).

There was no formal agreement among the defendants concerning the use of the expert witnesses. Counsel for remaining defendant Pierson attended a meeting during which the settling defendant's expert had discussed his potential testimony. However, none of the remaining defendants ever paid or, according to the plaintiffs, ever offered to pay for the services of the settling defendant's experts. There was no communication regarding shared usage, and no information was furnished by the remaining defendants to the settling defendant.

On January 22, 1997, the date of the settlement acceptance letter, counsel for remaining defendant Pierson communicated, via facsimile, to counsel for the plaintiffs that he wished to depose several of the experts identified by the settling defendant. According to counsel for remaining defendant Pierson, he telephoned plaintiffs' counsel on January 22, 1997, indicating his intention to use the settling defendant's witnesses and to seek a hearing on the expert witness issue on January 24, 1997. On January 23, 1997, plaintiffs' counsel, via facsimile, objected to any contact with the settling defendant's expert witnesses.

On January 23, 1997, plaintiffs' counsel received a notice of a hearing set at the request of counsel for remaining defendant Pierson for the next day (January 24, 1997) at 4:00 p.m. The notice arrived at approximately 5:00 p.m. at the offices of plaintiffs' lawyers. One of the plaintiffs' lawyers did not personally receive notice of the hearing until 10:30 a.m. on January 24, 1997; the other lawyer for the plaintiffs received a telephone call on January 23, 1997 informing him of the hearing.

On January 24, 1997, plaintiffs' counsel, arguing insufficient notice of the hearing under Rule 6(d) [1978] of the *West Virginia Rules of Civil Procedure* and insufficient time to research applicable West Virginia law, objected to the hearing and requested that the hearing be continued.

The hearing was held as scheduled. Except for counsel for remaining defendant Pierson who appeared in person, counsel for the other parties appeared by telephone. The hearing was conducted without a court reporter. According to plaintiffs' counsel, the hearing lasted only ten (10) minutes and plaintiffs' counsel had difficulty hearing "all of the conversation between Judge Hill and the defendant's counsel." The circuit court, after dismissing plaintiffs' objections based on inadequate notice, ruled that remaining defendants could talk to and

use at trial any expert listed by any defendant, including the settling defendant.² Claiming both procedural error and substantive error, the plaintiffs petitioned this Court to prohibit the order's enforcement.

II.

Discussion

A.

Criteria for Awarding a Writ of Prohibition

^[1] Our general criteria for determining if we should issue a rule to show cause in prohibition were stated in Syllabus Point 1 of *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979), which provides:

In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition ****29 *275** in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

In accord Syllabus Point 1, *State ex rel. W.Va. Fire & Casualty Co. v. Karl*, 199 W.Va. 678, 487 S.E.2d 336, (1997); Syllabus Point 2, *State ex rel. George B. v. Kaufman*, 199 W.Va. 269, 483 S.E.2d 852 (1997); Syllabus Point 1, *State ex rel. Fidelity and Guaranty Co. v. Canady*, 194 W.Va. 431, 460 S.E.2d 677 (1995).

^[2] We continue to emphasize the extraordinary nature of a writ of prohibition. Because the remedy sought by prohibition is extraordinary, we have limited the exercise of our original jurisdiction “to circumstances ‘of an extraordinary nature.’ ” *Fidelity*, *id.* 194 W.Va. at 436, 460 S.E.2d at 682, *quoting*, *State ex rel. Doe v. Troisi*, 194 W.Va. 28, 31, 459 S.E.2d 139, 142 (1995). *See State ex rel. Smith v. Maynard*, 193 W.Va. 1, 454 S.E.2d 46 (1994), *overruled on other grounds*, *State ex rel. Mitchem v. Kirkpatrick*, 199 W.Va. 501, 485 S.E.2d 445 (1997); *State ex rel. Allen v. Bedell*, 193 W.Va. 32, 454 S.E.2d 77 (1994).

^[3] ^[4] Although most discovery orders are interlocutory and reviewable only after final judgment, in certain circumstances involving a purely legal issue, a clear cut error, inadequate alternate remedies and judicial economy issues, this Court may issue a writ of prohibition when a circuit court abuses its discretion with regard to discovery. *See Fidelity*, *supra*, 194 W.Va. at 437, 460 S.E.2d at 682–83 for a discussion of the criteria for issuing a writ of prohibition involving discovery issues. Syllabus Point 1 of *State Farm Mutual Automobile Insurance Co. v. Stephens*, 188 W.Va. 622, 425 S.E.2d 577 (1992) states:

A writ of prohibition is available to correct a clear legal error resulting from a trial court's substantial abuse of its discretion in regard to discovery orders.

In accord Syllabus Point 2, *Fidelity*, *supra*; Syllabus Point 3, *State ex rel. McCormick v. Zakaib*, 189 W.Va. 258, 430 S.E.2d 316 (1993). *See Nutter v. Maynard*, 183 W.Va. 247, 250, 395 S.E.2d 491, 494 (1990) (“extraordinary relief [may be granted] where a discovery order presents a purely legal issue in an area where the bench and bar are in need of guidelines”); *State ex rel. Bennett v. Keadle*, 175 W.Va. 505, 334 S.E.2d 643 (1985).

In this case, we are asked for a writ of prohibition based on two issues. The first issue concerning the amount of notice required under Rule 6(d) [1978] of the *West Virginia Rules of Civil Procedure* presents a clear-cut issue without adequate alternate remedies because of the time factor. The second issue concerning the use of a settling defendant's expert witnesses by remaining defendants in violation of the settlement agreement presents a legal issue requiring immediate resolution because of judicial economy, namely, avoiding a second trial because of a high probability of reversal on appeal. Because these two issues should be addressed before a

final judgment, we exercise our original jurisdiction to resolve them.

B.

Rule 6(d) of the West Virginia Rules of Civil Procedure

^[5] Generally this Court reviews a circuit court's ruling on a discovery request for an abuse of discretion. The importance of the *West Virginia Rules of Civil Procedure* was noted in *Fidelity*, 194 W.Va. at 439, 460 S.E.2d at 685, quoting, *McDougal v. McCammon*, 193 W.Va. 229, 235, 455 S.E.2d 788, 794 (1995) by stating:

“[T]he West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making ... procedural rulings. As the drafters of the rules appear to recognize, ... procedural rulings, perhaps more than any others, must be made quickly, without unnecessary fear of reversal, and must be individualized to respond to the specific facts of each case.... Thus, absent a few exceptions, this Court will review all aspects of the circuit court's ****30 *276** determinations under an abuse of discretion standard.” (citations omitted).

In *Fidelity*, 194 W.Va. at 439, 460 S.E.2d at 685, we also noted that a heightened review is given where the circuit court has not followed the preference stated in the civil procedure rule or where “the trial court makes no findings or applies the wrong legal standard[.]” *Fidelity*, quoting *McDougal*, 193 W.Va. at 238, 455 S.E.2d at 797, quoting, *State v. Farley*, 192 W.Va. 247, 253, 452 S.E.2d 50, 56 (1994). “Where our Rules of Civil Procedure display a preference for a particular outcome, our review of decisions under those rules is sometimes more searching.” *Fidelity*, 194 W.Va. at 439, 460 S.E.2d at 685.

With these standards of review in mind, we consider the issue of notice under Rule 6(d) [1978] of the *West Virginia Rules of Civil Procedure*. Rule 6(d) provides:

For Motions—Affidavits.—A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 7 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for

cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 2 days before the hearing, unless the court permits them to be served at some other time. (emphasis added).

^[6] ^[7] Rule 6(d) requires notice of a hearing to be served “not later than 7 days” before the hearing, unless a different period is fixed “by order of the court.” In this case, notice of the hearing was given about 24 hours before the hearing. The purpose of the notice requirement of “Rule 6(d) is to prevent a party from being prejudicially surprised by a motion.” *Daniel v. Stevens*, 183 W.Va. 95, 104, 394 S.E.2d 79, 88 (1990). In *Daniel*, we found that because the party opposing the motion was not prejudicially surprised by the issue presented in the motion, the lack of notice was harmless. In *Cremeans v. Goad*, 158 W.Va. 192, 194–95, 210 S.E.2d 169, 171 (1974)(3 hours notice insufficient time to prepare for a hearing), we noted that Rule 6(d) is not a hard and fast rule, but sufficient time must be provided so that the parties have time to prepare. The Syllabus of *Cremeans* states:

While the language of Rule 6(d) of the Rules of Civil Procedure clearly permits a reduction of the time requirements for notice of hearing, where a trial court, in so acting, reduces time requirements to the extent that the party entitled to notice is deprived of all opportunity to prepare for hearing, such action constitutes a denial of due process of law and is in excess of jurisdiction.

The relators-plaintiffs maintain that they were prejudiced because they were unable to submit a brief to the circuit court outlining their position on the substantive question of expert witnesses. Although it appears that a deposition scheduled for early February by the settling defendant of one of his expert witnesses was the reason for holding the hearing, this reason, while justifying some advancement of the hearing, does not justify an immediate hearing. In this case, the relators-plaintiffs were prejudiced because they were unable to prepare for the hearing involving the substantive issue concerning a settlement agreement and the use of expert witnesses and were unable to present

their arguments in written form advising the circuit court of West Virginia precedent.

^[8] ^[9] Given the language of Rule 6(d) permitting the reduction of notice requirements, we apply an abuse of discretion standard to the orders reducing Rule 6(d)'s notice requirements. On the first issue of the lack of notice under Rule 6(d), we find that the circuit court abused its discretion in holding a hearing when the non-moving parties were given almost no notice and no time to prepare. Based on this finding, we grant a writ prohibiting the circuit court from enforcing its January 24, 1997 ruling.

C.

Use of Expert Witnesses Identified by Settling Defendants

^[10] The second issue concerns the use by the remaining defendants of expert witnesses ****31 *277** identified by the settling defendant, in violation of the settlement agreement between the plaintiffs and the settling defendant. Our standard of review of evidentiary matters is the well-settled rule stated in Syllabus Point 10 of *Board of Ed. of McDowell County v. Zando, Martin & Milstead, Inc.*, 182 W.Va. 597, 390 S.E.2d 796 (1990):

“ ‘Rulings on the admissibility of evidence are largely within a trial court’s sound discretion and should not be disturbed unless there has been an abuse of discretion.’ *State v. Louk*, 171 W.Va. 639, 301 S.E.2d 596, 599 (1983)[. *overruled on other grounds*, *State v. Bradshaw*, 193 W.Va. 519, 457 S.E.2d 456 (1995)]. Syllabus Point 2, *State v. Peyatt*, [173] W.Va. [317] 315 S.E.2d 574 (1983).” Syllabus Point 7, *State v. Miller*, [175] W.Va. [616] 336 S.E.2d 910 (1985).

See West Virginia Dept. of Highways v. Mountain, Inc., 167 W.Va. 202, 279 S.E.2d 192 (1981); *Casto v. Martin*, 159 W.Va. 761, 230 S.E.2d 722 (1976).

^[11] The issue of use by the remaining defendants of the settling defendant’s expert witnesses presents two important competing policies. One policy is based on the principle that “ ‘the public ... has a right to every man’s evidence.’ ” *U.S. v. Bryan*, 339 U.S. 323, 331, 70 S.Ct. 724, 730, 94 L.Ed. 884, 891 (1950), *quoting*, John H. Wigmore, *Evidence* § 2192 (3rd ed.). “[E]xceptions to the demand for every man’s evidence are not lightly created nor expansively construed, for they are in derogation of

the search for the truth. (footnote omitted).” *U.S. v. Nixon*, 418 U.S. 683, 710, 94 S.Ct. 3090, 3108, 41 L.Ed.2d 1039, 1065 (1974).

^[12] The other policy is the encouragement of settlement rather than litigation to resolve controversies by upholding contracts fairly made that do not contravene public policy. Indeed, “[t]he law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation; and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy.” Syllabus Point 1, *Sanders v. Roselawn Memorial Gardens, Inc.*, 152 W.Va. 91, 159 S.E.2d 784 (1968). *In accord* Syllabus Point 1, *Riggle v. Allied Chemical Corp.*, 180 W.Va. 561, 378 S.E.2d 282 (1989); Syllabus Point 2, *State ex rel. Vapor Corp. v. Narick*, 173 W.Va. 770, 320 S.E.2d 345 (1984).

^[13] However, the dilemma between these competing policies was created by the remaining defendants who then sought rescue from the circuit court claiming a right to all available evidence. At this stage of discovery in a medical malpractice case, the policies are in conflict. But, the dilemma could have been avoided by the remaining defendants. The remaining defendants had the same opportunity as the settling defendant to select their own expert witnesses and to identify those experts to the plaintiffs, or the defendants could have agreed to a formal arrangement to share expert witnesses. Neither was done in this case.

We have addressed the issue of use of the settling defendant’s expert witnesses by the remaining defendant on two occasions. In *Riggle v. Allied Chemical Corp.*, *supra*, we upheld the denial of a continuance for the remaining defendant to obtain its own experts. The request for the continuance occurred after Allied, a co-defendant, settled after the first day of trial by a “Mary Carter” settlement agreement.³ Because of the “Mary Carter” settlement, Allied, who remained as a defendant, “did not present the extensive defense it had originally planned.” 180 W.Va. at 564, 378 S.E.2d at 285. In upholding the denial of the continuance we “point[ed] out that appellant had years to prepare its case, and had no right to rely on expert evidence developed by Allied to fight the plaintiffs’ claims.” 180 W.Va. at 569, 378 S.E.2d at 290. After noting that settlement was a possibility, we said, “if appellant wanted to fight plaintiffs’ claim, it could have prepared its own case rather than relying on Allied’s experts.” *Id.* We found the appellant ****32 *278** “had only itself to blame for the result.” *Id.*

A similar approach was taken in *Board of Ed. of McDowell County v. Zando, Martin & Milstead, Inc.*, *supra*, when Zando, Martin & Milstead ("ZMM"), the remaining defendant, attempted to call the expert witnesses of the settling defendant in violation of the settlement agreement. In *Zando*, although the settlement prohibiting the use of the settling defendant's expert witnesses was reached several weeks before trial, ZMM attempted to use these experts at trial. The circuit court granted "ZMM a recess to attempt to obtain an expert of its own, but when trial resumed five days later, ZMM asserted that it had been unable to locate any witnesses who could offer the same testimony. (footnote omitted)." *Zando*, 182 W.Va. at 613, 390 S.E.2d at 812. In *Zando*, we upheld the circuit court's refusal to allow the remaining defendant, ZMM, to use the settling defendant's expert witnesses. In *Zando, id.*, we concluded:

It is obvious to any sophisticated trial lawyer that in litigation involving multiple defendants there is the likelihood that settlements will occur before trial. To rely on another party defendant's witnesses without some formal agreement as to shared use is to invite the consequences that arose in *Riggle* and in the present case. The end result is that no error can be claimed.

[14] Based on reasoning underlying *Riggle* and *Zando*, we hold that, absent a formal agreement among defendants in a litigation proceeding involving multiple defendants, the circuit court should not generally permit a settling defendant's expert witnesses to testify for the remaining defendants. When a settlement agreement between the settling defendant and the plaintiffs prohibits the continued use of the settling defendant's expert witnesses by the remaining defendants, the circuit court, subject to Rule 26(b)(4)(B) [1988] of the *West Virginia Rules of Civil Procedure*, should honor that agreement by not permitting the remaining defendants to use or present such information in the preparation for or conduct of the trial.⁴

Two other courts have addressed the question of public policy and an expert witness limitation. The Texas Supreme Court in *Tom L. Scott, Inc. v. McIlhenny*, 798 S.W.2d 556, 559 (Tex.1990) rejected the settlement agreement's redesignation of expert witnesses to preclude the witnesses from testifying based on "[t]he primary policy behind discovery is to seek truth so that disputes

may be decided by facts that are revealed rather than concealed." However, this approach was rejected in *Wolt v. Sherwood, a Div. Of Harsco Corp.*, 828 F.Supp. 1562, 1567 (D.Utah 1993), which after comparing the Texas Supreme Court's reasoning to our reasoning in *Zando*, said that "the court is persuaded that West Virginia more accurately states the rule that should be followed by this court." The *Wolt* court found that the purposes of discovery were not frustrated by "allowing a plaintiff to purchase the expertise of a settling defendant" because of the availability of the " 'exceptional circumstances' [exception] under Fed.R.Civ.P. 26(b)(4)(B). (footnote omitted)." 828 F.Supp. at 1568.⁵ The determination of upholding a settlement agreement that precludes the testimony of a settling defendant's expert witnesses "is designed to promote fairness by precluding unreasonable access to an opposing party's diligent trial preparation." *Wolt*, 828 F.Supp. at 1568, *quoting, Durflinger v. Artiles*, 727 F.2d 888, 891 (10th Cir.1984) (discussing *Fed.R.Civ.P.* 26(b)(4)(B)).

In this case, the remaining defendants claim that the reservations contained in their identification of expert witnesses supposedly give them the "right" to use any experts **33 *279 named by any other defendant or party. These declarations are not a formal agreement about sharing expert witnesses; they provide no notice to the plaintiffs, and therefore, they should not be considered adequate preparation in a litigation involving multiple defendants. Such self-serving statements should not deprive the plaintiffs of the settlement bargain which included the removal of the settling defendant's expert witnesses.⁶ We note that in this case the remaining defendants may still have the time and the opportunity to develop their own defense. The effect of our holding in this case is simply to prevent the remaining defendants from using the trial preparation of the settling defendant, who agreed not to allow such use in the settlement agreement.

We find that the circuit court abused its discretion in allowing the remaining defendants to use the settling defendant's expert witnesses in violation of the settlement agreement. The plaintiffs should not be deprived of the settlement bargain they gained by their strategy of *divide et impera*.⁷

For the above stated reasons, the petition for a writ of prohibition is granted. The underlying case shall proceed below in accordance with the principles set forth in this opinion.

Writ granted.

Parallel Citations

489 S.E.2d 24

Footnotes

- ¹ Because a writ of prohibition is sought, the factual information presented in this opinion is based on the petition, with attached exhibits and the responses, with attached exhibits.
- ² Because of an unrelated matter, Judge Hill voluntarily recused himself from the case about a week later. Thereafter the case was reassigned to another judge.
- ³ In *Riggle v. Allied*, 180 W.Va. at 563 n. 5, 378 S.E.2d at 284 n. 5, we noted that the name for this type of settlement is derived from *Booth v. Mary Carter Paint Co.*, 202 So.2d 8 (Fla.App.1967), *overruled*, *Ward v. Ochoa*, 284 So.2d 385 (Fla.1973).
- ⁴ Rule 26(b)(4)(B) [1988] of the *West Virginia Rules of Civil Procedure* provides:
A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of *exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.* (emphasis added).
- ⁵ The exceptions permitting discovery provided in Rule 26(b)(4)(B) [1988] of the *West Virginia Rules of Civil Procedure* are similar to the exceptions in the current federal rule.
- ⁶ In his supplemental response, remaining defendant Pierson argues that the circuit court's ruling had no effect on the settlement because, by order entered on March 18, 1997, the settling defendant was dismissed with prejudice. However, the plaintiffs by petition filed on February 18, 1997, were already seeking review of the circuit court's order allowing use of the expert witnesses.
- ⁷ According to J. Bartlett, *Familiar Quotations* (16th ed.1992) 118, *divide et impera* [divide and rule] is an ancient anonymous political maxim cited by Machiavelli.